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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HAROLD DEAN BUTTS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

SHOULD OFFICERS WHO ARE ENTITLED TO RELY UPON JUDICIALLY AUTHORIZED WARRANTS, UNDER *LEON*, BE COMPELLED TO COMPLY WITH THE EXPRESS DIRECTIVES CONTAINED IN THOSE WARRANTS?

The issues presented by this Application have divided the *en banc* Court of Appeals for the Fifth Circuit:

I. Whether the government may offer evidence obtained in direct violation of the express written command of the very judicial warrant that allowed the officers to break into the interior of an aircraft to install an electronic tracking device where it is undisputed that the evidence was obtained as the result of their monitoring the transponder after the officers had been expressly ordered to remove same?

II. Whether the warrantless monitoring of a transponder secreted within a zone of privacy violates the Fourth Amendment?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, HAROLD DEAN BUTTS, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO OPINIONS BELOW

The opinion of the *en banc* Court of Appeals (App. infra, A-1 - A-38) is reported at 729 F.2d 1514. The panel opinion of the Court of Appeals (App. infra, B-1 - B-36) is reported at 710 F.2d 1139. The opinion of the District Court (App. infra, C-1 - C-12) is not reported. The opinion of the Fifth Circuit (App. infra, G-1 - G-2) is not reported.

SUBSEQUENT HISTORY

This Court on a previous occasion denied certiorari based upon a Memorandum of the Solicitor General contending that there is no authority for an accused to reach certiorari review from this Court of the Government's interlocutory appeal of an order suppressing evidence, suggesting instead that:

> "Whatever the merits of petitioner's contentions they are not presently ripe for review by this Court. The Court of Appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If . . . petitioner is convicted [following remand and trial on the merits] and his conviction affirmed on appeal, he will then be able to present his present contention to this Court . . . in a petition for a writ of certiorari seeking review of a final judgment against him . . . review by this Court of the Court of Appeals' decision would be premature at this time." Memorandum in Opposition (App. infra, E-3 - E-4).

As predicted by the Solicitor General, Petitioner has been convicted on remand and his appeal affirmed. As suggested by the Solicitor General, Petitioner now comes before this Court for review.

JURISDICTION

The judgment of the *en banc* Court of Appeals was entered on April 23, 1984. A suggestion for reconsideration and rehearing of *en banc* opinion was denied on May 22, 1984 (App. infra, D-1). Certiorari was denied by this Court on September 18, 1984 (App. infra, F-1). The subsequent judgment of the Court of Appeals was entered

November 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner timely seeks review by this Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

THE MAJORITY *EN BANC* OPINION CONFLICTS WITH THIS COURT RULING IN *KARO*

The District Court's suppression of the evidence was affirmed by a divided panel of the Fifth Circuit. A sharply divided *en banc* Fifth Circuit reversed the panel opinion. The Fifth Circuit majority's *en banc* decision is in conflict with the Court's recent decision in *Karo* in holding that "no Fourth Amendment right was infringed" by monitoring a beeper installed within the interior of an aircraft after the agents had been ordered to remove same. *U.S. v. Butts* (5th Cir. 1984) 729 F.2d 1514, 1518.

This position was adopted by the government in *Karo* but rejected by this Court:

> "The government argues that the traditional justifications for the warrant requirement are inapplicable in beeper cases, but to a large extent that argument is based upon the contention, rejected above, that the beeper constitutes only a minuscule intrusion on protected privacy interests. . . . Requiring a warrant

will have the salutary effect of insuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search. . . . [a]nd the length of time for which beeper surveillance is requested." *U.S. v. Karo*, ____U.S.____, 104 S. Ct. 3296, 3304-3305 (1984).

STATEMENT OF RELEVANT FACTS

WARRANT OBTAINED TO INSTALL BEEPER

On June 19, 1981, United States Customs Pilot Lawrence Nichols swore out an affidavit seeking judicial authorization to surreptitiously enter and install a transponder[1] within the interior instrument panel of an aircraft bearing Registration Number N4926B.

On the basis of information contained in the affidavit, a warrant was issued to install a beeper within the interior of the aircraft and monitor same for a period not to exceed thirty (30) days. [Rec. at p. 104, 191-192].

INITIAL PERIOD OF MONITORING REVEALED NO INFORMATION

During the initial thirty (30)-day monitoring period, the functioning beeper failed to detect any movement or nefarious activity associated with the suspect aircraft. Furthermore, during the same period of time, there was no additional information supplied to any law enforcement officer regarding the activities of the aircraft, its owner, or any other individual associated with it.

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1. The transponder, also referred to as a "beeper" or "beacon", is a miniature, radio transmitter that operates off the aircraft power system, and emits a signal at a set frequency.

EXTENSION OF ORIGINAL AUTHORIZATION CONTAINED AN EXPRESS JUDICIAL DIRECTIVE TO REMOVE TRANSPONDER FROM AIRCRAFT UPON EXPIRATION OF THIRTY (30) DAYS

On July 21, two days after the initial warrant had expired by its own terms[2] [Rec. 104, l.8 - p. 104, l.6], the same customs agent appeared before the Magistrate and "sought an extension of thirty days" of the now terminated warrant [Rec. 104, l.8-11]. Testimony of the agent at the Motion to Suppress hearing revealed that no affidavit setting out additional probable cause was filed, and instead, the agent chose to rely solely on the probable cause used to obtain the original warrant. Nevertheless, an extension of the original Order was granted but with an explicit and express condition: the transponding device was to be removed not later than thirty (30) days from the expiration of the original Court Order.

> "YOU ARE HEREBY GRANTED an extension forthwith on the above described Beechcraft B-50 aircraft, bearing registration number N4926B, a transponder signaling device to remain on aircraft *for a period of 30 days. You are also directed to remove the transponder from aircraft N4926B no later than 30 days from the expiration of the original court order* [expiration date 07/19/81] that authorized the installation of the electronic equipment." [emphasis supplied].

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2. The original Court order expired on Sunday, July 19, 1981. For purposes of computing when the order expired under Fed. R. Crim. P. 45(a), same would have been not later than Monday, July 20, 1981. The agent sought and received an extension of the expired order on July 21, 1981, the following day.

NO ATTEMPT MADE TO COMPLY WITH COURT ORDER REQUIRING REMOVAL OF TRANSPONDER ON AUGUST 18, 1981

Despite the explicit Court Order, the Agents failed to take any action on August 18, 1981, as required by the express terms of the Court Order [Rec. p. 92, l.14-16]. In fact, no agent even made an "attempt to remove the beeper before that date." [Rec. p. 107, l.14-16].

Agent Weatherman testified that he was out of the State "on active duty" at the time and was unable to remove the device himself. However, the Agent acknowledged that at least two other qualified individuals were authorized to install and remove such beepers in the San Antonio, Texas, office alone [Rec. p. 106, l.18-21], and that he knew well in advance [some five months before he even sought the warrant] that he would be unavailable on August 18, 1981 [Rec. p. 105, l.14 - p. 106, l.17].

While the officers acknowledged their agency has "a procedure for [them] to remove [the] beeper on or before the date . . . the warrant provides that [they] should remove it" [Rec. p. 146, l.3-6], no attempt was made to do so herein.

MAGISTRATE NOT INFORMED OF NONCOMPLIANCE NOR WAS A SECOND EXTENSION SOUGHT

Not only did the Agents fail to comply with the Magistrate's directive to remove the beeper, they failed to apprise the Magistrate of their disobedience to his directive or make any attempt to obtain a second extension. Furthermore, at the Motion to Suppress hearing, the Govern-

ment stipulated "that the actual surveillance and ultimate search took place a few days after the extension order had expired." [Rec. p. 193, l.9-11].

ELECTRONIC BEEPERS DON'T KNOW WHEN TO QUIT

It was also acknowledged by the Government that once installed, this type of transponder has no way of turning itself off [Rec. p. 146, l.7-15], and "the only way the Customs Service has . . . of complying with the Court Order telling it to [cease] monitoring is to go in and take the beeper out." [Rec. p. 146, l.16-19].[3]

COULD NOT HAVE SURVEILLED THIS AIRCRAFT WITHOUT "BEEPER"

The officers testified they needed the "transponder or tracking device because without it [they] would not be able to maintain surveillance of this particular aircraft" due to [its] range and speed. [Rec. p. 197, l.5-25].

TARGET TRACKED AFTER THE OFFICERS HAD BEEN DIRECTED TO REMOVE "BEEPER"

Four days after the authorization had thus expired and the agents had been ordered to remove the device, a "target" was picked up by an air officer on his radar screen at "Houston Control", heading in a Southerly direction [Rec. p. 4, l.17-19]. For the first time since the beeper had been surreptitiously installed, Customs

3. For example, in *U.S. v. Reyes,* 595 F.2d 275 (5th Cir. 1973), the court noted that there "the transponder by which the aircraft . . . tracked had been installed fourteen months earlier by government agent." At p. 278.

Agents went to the location where the "beeper" had been installed, the Seguin Airport, and found the airplane was not there [Rec. p. 24, l.19-22].

An aircraft was again picked up some ten (10) hours later, 106 miles into the interior of Mexico, heading in a Northerly direction.

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The Customs Pilots landed immediately after Petitioner's aircraft touched down in Castroville, Texas. The Agents blocked the runway, ordered the Appellee out of the plane he was piloting and placed him under arrest. A search of the airplane revealed approximately eight pounds of marijuana.

The Government stipulated at the Motion to Suppress hearing "that they are relying upon the warrant and the affidavit" [Rec. p. 193, l.13-19] and "that the actual surveillance and ultimate search took place a few days after the extension order had expired" [Rec. p. 193, l.9-11].

REASONS FOR GRANTING THE PETITION

This case presents two substantial questions. The narrow question is whether officers who seek and obtain warrants should be required to abide by the explicit and unambiguous directives contained in those judicial orders. The broader issue raised by this petition is whether the installation, maintenance, and monitoring of an electronic transponder from within the "zone of privacy" of the interior passenger compartment of a conveyance requires a warrant for a specific and reasonable period of time. The majority decision of the *en banc* Court of Ap-

peals directly conflicts with the decisions of this Court and other courts of appeals. Accordingly, review by this Court is warranted to resolve the conflicts on these important questions of substantive law.

I.

OFFICERS WHO ARE ENTITLED TO RELY UPON JUDICIALLY AUTHORIZED WARRANTS, UNDER *LEON*, SHOULD BE COMPELLED TO COMPLY WITH THE EXPRESS DIRECTIVES CONTAINED IN WARRANTS THEY SOUGHT AND UPON WHICH THEY RELIED

The teaching of this Court's recent opinion in *U.S. v. Leon*, ____U.S.____, 104 S. Ct. 3405 (1984) is that police officers are entitled to act in reliance upon even an erroneously issued judicial warrant because of the desire to encourage warrant practice and the fact that "[P]enalizing the officer for the magistrate's error, *rather than his own*, cannot logically contribute to the deterrence of Fourth Amendment violations." *U.S. v. Leon, supra* (emphasis supplied). If under *Leon* an officer is entitled to rely upon a warrant lacking in probable cause, then surely that officer should be required to comply with the written directives contained therein.

When acting pursuant to a Court Order that is unambiguous on its face, it is assumed that officers will follow its commands. This Court in *Leon* made clear that law officers have "a sworn duty to carry out" the provisions of a judicial warrant.

> "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and *the officer*

> *has a sworn duty to carry out its Provisions.*" (emphasis supplied) *U.S. v. Leon, supra.*

We are confronted here with the maintenance of a transponder and gathering of evidence in direct violation of the very Court authorization upon which the Government originally relied. If ever there should be a case where the full force of this Court's supervisory powers should be felt it should be in such instances of flagrant disregard of judicial authority:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as "due process of law" . . . A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. U.S.*, 318 U.S. 332, 340, 343 (1943).

If this Court were to sanction searches conducted without probable cause based upon an officer's claimed reli-

ance on a judicially issued warrant, without at the same time requiring that officer to abide by the express terms of that warrant, same would amount to a total abdiction of the judiciary's role in supervising the police and enforcing the fourth amendment. Who then will protect us from our protectors?

More importantly, allowing Government agents to defy judicial directives would breed an air of contempt, circumvent the necessity to resort to the judicial process, and impermissibly expand the power and authority of law enforcement agencies.

As the Supreme Court wrote over twenty (20) years ago:

> "Nothing can destroy a government more quickly than its own failure to observe its own laws, or worse, its disregard of the character of its own existence. . . . Our government is the potent, the omnipresent teacher for good or for ill, it teaches the whole people by its example . . . If the government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself: it invites anarchy." *Mapp v. Ohio,* 367 U.S. 643, 659 (1961).

Can it be that the state of Fourth Amendment law has come to the point where an officer may rely upon the terms of a search warrant regardless whether that document establishes probable cause, while at the same time, if it serves his purpose, ignore the magistrate's express directives with impunity? Having determined that officers may act in good faith reliance upon determinations by a magistrate, this Court should at least require that those same officers abide by the judicial orders they have sought.

II.

SUPPRESSION OF EVIDENCE PROPER WHERE WARRANT AUTHORIZING INSTALLATION AND MONITORING BEEPER SECRETED WITHIN ZONE OF PRIVACY HAD, BY ITS OWN TERMS, EXPIRED

The recent decisions in *U.S. v. Knotts,* 460 U.S. 276, 103 S. Ct. 1081 (1983), and *U.S. v. Karo,* ___U.S.___, 104 S. Ct. 3296 (1984), make it clear that the installation, maintenance, and monitoring of a beeper from within the interior passenger compartment's "zone of privacy" requires a warrant. This case is ripe for consideration by this Court as it would complete the "beeper trilogy" and answer the critical questions left unresolved in *Knotts* and *Karo*: whether a warrant is required to install and monitor a beeper secreted within a zone of privacy. *See, U.S. v. Karo, supra,* at p. 5105 n.5.

"PROBABLE CAUSE" NOT "REASONABLE SUSPICION" THE STANDARD WHERE GOVERNMENT AGENT SEEKS TO SURREPTITIOUSLY ENTER INTERIOR OF AIRCRAFT TO INSTALL TRANSPONDER

In *U.S. v. Karo,* the Government argued that a showing of reasonable suspicion rather than probable cause should be the appropriate standard for beeper monitoring. Since that issue was not before this Court, it was not addressed. *U.S. v. Karo, supra.* Here, this issue is squarely before the Court.

Although this Court has not addressed the appropriate standard to be applied, several lower courts have uniform-

ly held that entry into the "interior" of a vehicle to install the beeper constitutes a search since it involves an intrusion into an area where there is a "reasonable expectation of privacy." *United States v. Whitley* (5th Cir. 1982) 670 F.2d 617 [Aircraft]; *United States v. Flynn* (5th Cir. 1982) 664 F.2d 1296 [entry into aircraft]; *United States v. Cady* (5th Cir. 1981) 651 F.2d 290 [entry into aircraft]; *United States v. Pretzinger* (9th Cir. 1976) 542 F.2d 517; *United States v. Hufford* (9th Cir 1976) 539 F.2d 32; *U.S. v. Padilla,* 520 F.2d 536 (1st Cir. 1975), recording device installed in room was illegal and does not fall within the consensual recording exception which would have permitted a recording device on agent's person. *Contra: U.S. v. Gant,* 702 F.2d 1341 (11th Cir. 1983). *See also*: *Rovinsky v. State,* 605 S.W.2d 578 (Tex. Civ. App. 1980). The implanting of a tracking device inside a vehicle requires government agents to invade the passenger compartment or cabin by opening a door or breaking a lock. Thereafter, the device is affixed to the interior of the vehicle where it remains for a potentially infinite period of time. As was observed in the now withdrawn panel opinion in this case:

> "In a very real sense the beeper serves as a surrogate police presence that remains within the vehicle's interior and converts the area into a covert broadcasting station. Given the capacity of such devices to impart information, the introduction of these government controlled objects into an area in which an individual legitimately retains an expectation of privacy constitutes an offensive invasion of fourth amendment values. The government via its electronic counterpart remains physically present within the interior of the vehicle from the moment its agents enter until the tracking device ceases to function. In this age of electronic wizardry it is not too much

> to suppose that beepers soon will have virtually unlimited lifespans. The continuing intrusion of such a device into a privacy-cloaked area, an intrusion that could potentially last from here to eternity, mandates greater protections . . . *U.S. v. Butts* (5th Cir. 1983) 710 F.2d 1139, 1149.

MONITORING A SIGNAL EMITTED FROM A ZONE OF PRIVACY

There should be little question that if an individual has a sufficient privacy interest in an area to require a warrant for surreptitious entry into that area to install an electronic transmitting device, such privacy expectation should be sufficient to require judicial scrutiny of any prolonged monitoring of the signal emitted from within that zone of privacy. *See: Silverman v. United States,* 365 U.S. 505 (1961) [where the Supreme Court held a warrant was required to install and monitor a microphone imbedded into an adjoining wall on the grounds that same was accomplished by means of an authorized physical penetration" constituting "an actual intrusion into a constitutionally protected area"]; *Clinton v. Virginia,* 377 U.S. 158 (1964).

This concept of monitoring from a "zone of privacy" has been recognized by a number of courts, *U.S. v. Bailey* (6th Cir. 1980) 628 F.2d 938, at p. 944; *U.S. v. Moore* (1st Cir. 1977) 562 F.2d 106, at p. 113. In *United States v. Sheikh* (5th Cir. 1981) 654 F.2d 1057, the Fifth Circuit noted there was a heightened privacy concern where the Government was monitoring from a "place hidden from public view." *United States v. Sheikh, supra,* at p. 1071. However, because the container there contained "known contraband" the Court did not reach this issue.

Furthermore, the warrant requirement for monitoring a transmission from within an area of expected privacy is underscored by the Supreme Court's decision in *Dalia v. United States*, 441 U.S. 238 (1979) where, considering the inverse proposition, the court held that a warrant to monitor from within a constitutionally protected area presupposed the right to physically penetrate that area to install such a device, indicating that the paramount concern with electronic surveillance into a protected area is its continuing nature rather than the initial intrusion.

RECENT DECISIONS OF THIS COURT DO NOT COMPEL CONTRARY RESULT

United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L.Ed.2d 55 (1983) does not compel a contrary result since the Court in *Knotts* was not confronted with the issue of monitoring a beeper signal emitted from a "zone of privacy".

> "Respondent Knotts, as owner of the cabin and surrounding premises to which Petsaker drove, undoubtedly had the traditional expectation of privacy within dwelling place insofar as the cabin was concerned . . . But no such expectation of privacy extended to the visual observation of Petcher's automobile arriving on his premises after leaving a public highway; nor to movements of objects such as the drum of chloroform OUTSIDE THE CABIN IN THE 'OPEN FIELDS'. [citation omitted]." (emphasis supplied) *United States v. Knotts*, ____U.S.____, 103 S. Ct. 1081, 75 L.Ed.2d 55, at p. 62 (1983).

Indeed, Justices Brennan and Marshall indicated that if this Court had been considering a case of beeper monitoring from within a zone of privacy, the Fourth Amendment may have compelled a different result:

> "Cases such as *Silverman v. United States,* 365 U.S. 505, 509, 512 (1964), however, hold that when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." *United States v. Knotts,* ____U.S.____, 75 L.Ed.2d 55, at p. 65 (1983) (Brennan joined by Marshall concurring *in judgment*).

In short, *Knotts* would be dispositive only if in *Knotts* the Government, rather than placing the "beeper" in the chloroform cannister with the consent of the distributor who owned and had possession of it, had waited until after Mr. Knotts purchased the cannister and then broken into his vehicle to insert the device inside the passenger compartment within the cannister therein.

Similarly, this Court's recent decision in *Karo* is not dispositive of the issue herein. In *Karo,* this Court rejected the Government's contention that it was unnecessary to resort to obtaining a warrant since "the beeper constitutes only a minuscule intrusion on protected privacy interests." *U.S. v. Karo, supra.* Instead, this Court expressly recognized the necessity of a warrant to enter and monitor a transponder from within a recognized zone of privacy:

> "The primary reason for the warrant requirement is to interpose a neutral and detached magistrate" between the citizen and "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). Those suspected of drug offenses are no less entitled to that protection than those suspected of non-drug offenses. Requiring a warrant will have the salutary

> effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search." *U.S. v. Karo, supra.*

Furthermore, there is a critical distinction between *Karo* and the instant case: in *Karo,* this Court held that the search warrant affidavit contained sufficient information to furnish probable cause *"after striking the facts about monitoring the beeper."* (emphasis supplied). *U.S. v. Karo, supra.* In the Petitioner's case, the sum total of evidence against him was based solely on the tainted information obtained from the warrantless monitoring.

DURATION OF TRACKING DEVICE MUST BE LIMITED TO ASSURE THAT THERE IS NO ABUSE OF THE BEEPER

The continued presence of a tracking device must be subject to judicial scrutiny so as to assure citizens that the duration of the beeper's life will not be unreasonable.[4] In *Knotts,* this Court spoke of the potential abuse of beepers:

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4. *See Kupper,* 693 F.2d 1132, 1134, n.2 (noting that magistrate's order authorizing beeper installation "was limited in duration"); *Parks,* 684 F.2d at 1085 (characterizing beeper's presence in aircraft interior as "continuing physical intrusion or trespass"); *United States v. Brock* (9th Cir. 1982) 687 F.2d 1311, 1322. ("[T]he [c]ourt cannot countenance the potentially unlimited duration of this type of surveillance '[location beepers]' " (quoting with approval *United States v. Cofer* (W.D. Tex. 1978) 444 F.Supp. 146, 149-150; *Bailey,* 628 F.2d at 945 & n.12 (due to absence of termination date in authorizing warrant, beeper's presence could have continued "ad infinitum"); *United States v. Curtis* (9th Cir. 1977) 562 F.2d 1153, 1156 (expressing need for reasonable time limitations and other reasonable restrictions on beeper use); *United States v. Moore,* 562 F.2d 106, 113, n.4 (noting that duration of beeper use was limited and cautioning that additional safeguards might be required for extensive periods of beeper installation).

> "Respondent expresses the generalized view that the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision." *Br. for Resp. at 9* (footnote omitted). But the fact is that the "reality hardly suggests abuse," *Zurcher v. Stanford Daily*, 436 U.S. 547, 566, 56 L.Ed.2d 525, 98 S. Ct. 1970 (1978); if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *U.S. v. Knotts, supra* at p. 63.

The reality of the instant case suggests the very abuse envisioned by Respondent Knotts. Here, the Government kept appellee's aircraft under 24 hour surveillance not only without judicial supervision or knowledge, but in flagrant and outright *defiance of* a judicial order. Here, the Government's conduct evinces the "dragnet type law enforcement" that Respondent Knotts complained of. *Supra* at p. 63. Accordingly, this Court must now "determine whether different constitutional principles may be applicable" and in light of the facts in this case, must address the issue expressly left unresolved by the Supreme Court in *Knotts. United States v. Knotts, supra,* at p. 63.

The *Karo* decision reiterated and reaffirmed this Court's concern for the potential abuse of electronic transponders: "Requiring a warrant will have the salutary effect of ensuring that the use of beepers is not abused. . . ." *U.S. v. Karo, supra.* Additionally, this Court held that monitoring without a warrant may violate the Fourth Amendment, *Id.*, and, that the affidavit must describe the "object into which the beeper is placed, the circumstances that lead agents to wish to install the beeper, *and length of time*

for which beeper surveillance is requested." Id. (emphasis supplied)

Here, the agents' callous indifference to the Magistrate's express mandate requiring removal of the transponder within a specified period exacerbates the very reason underlying judicial intervention; to minimize the abuse of such sophisticated gadgetry.

III.

POLICY CONSIDERATIONS

TECHNOLOGICAL ADVANCES HEIGHTEN NEED FOR JUDICIAL INTERVENTION AND PROTECTION

This decade has demonstrated that law enforcement has responded to the technological onslaught by efficiently utilizing and implementing surveillance devices unimaginable twenty years ago. The Government today can much more efficiently and surreptitiously invade that which citizens could have reasonably expected to be private a few short years ago. It can, completely without detection, electronically, very neatly and discretely "appear" in any man's home, automobile or aircraft conveying to human listeners perhaps entire conversations or mere singular, but private facts, such as physical presence.

As the technology of surveillance hardware advances by geometric progressions, the citizen's right to privacy will necessarily diminish in inverse proportions, unless clear safeguards have been established. In this electronic age the citizens may be in need of more, not less protection.

CONCLUSION

In light of the substantial issues raised, Petitioner respectfully prays that this Court grant his Petition for Writ of Certiorari.

Dated: February 5, 1986.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GERALD H. GOLDSTEIN, hereby certify that on this 5th day of February, 1986, copies of this Petition for Writ of Certiorari were mailed, first class, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

_____
GERALD H. GOLDSTEIN
Counsel for Petitioner,
Harold Dean Butts

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,
Plantiff-Appellant,

v.

HAROLD DEAN BUTTS,
Defendant-Appellee.

No. 82-1260

United States Court of Appeals,
Fifth Circuit.

April 23, 1984.

Defendant was charged with importing marjuana, possession of marijuana with intent to distribute, and with carrying a firearm during commission of felony. The United States District Court for the Western District of Texas, Dorwin W. Suttle, J., granted defendant's motion to suppress evidence obtained as result of monitoring of electronic beeper installed inside aircraft defendant was piloting, and the Government appealed. The Court of Appeals, 710 F.2d 1139, affirmed. On rehearing en banc, the Court of Appeals, Clark, Chief Judge, held that monitoring by customs officials of signal that disclosed presence of aircraft in public airspace was not unconstitutional search or seizure under the Fourth Amendment because terms of warrant authorizing signalling device required it to be removed before its signal was recorded.

Reversed and remanded.

Garwood, Circuit Judge, filed an opinion concurring in the result.

Goldberg, Circuit Judge, filed a dissenting opinion in which Politz and Tate, Circuit Judges, joined.

E. Grady Jolly, Circuit Judge, filed a dissenting opinion in which Goldberg, Politz, Tate and Jerre S. Williams, Circuit Judges, joined.

Sidney Powell, Asst. U.S. Atty., San Antonio, Tex., for plaintiff-appellant.

Gerald Goldstein, Robert B. Hirschhorn, Ralph A. Lopez, San Antonio, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

CLARK, Chief Judge:

[1] Was the monitoring by customs officials of a signal that disclosed the presence of an aircraft in public airspace an unconstitutional search or seizure under the Fourth Amendment because the terms of the warrant authorizing the signaling device required it to be removed before its signal was recorded? We hold it was not. The warrant violation did not change the detection of the defendant's public activity into a Fourth Amendment violation. The evidence obtained by such monitoring should not have been suppressed.

I

On June 19, 1981, a United States Customs Agent filed an affidavit seeking court authorization to install an electronic tracking device, commonly called a beeper, inside a designated aircraft. In the affidavit, the agent alleged that probable cause existed to believe the aircraft would be used to import marijuana into the United States. Based on this affidavit, a United States Magistrate authorized the installation. The warrant required the beeper to be removed within thirty days after its installation. During the night of June 19, a customs agent installed the beeper in the interior of the aircraft, which was parked at a Seguin, Texas, airport.

On July 21, two days after expiration of the thirty-day time limit, a customs agent sought and was granted an extension of the original authorization. No further entry of the aircraft was made at that time. The extension order directed that the beeper be removed no later than August 19, which was thirty days from the date of the original expiration date. The installing agent was not on duty on August 19, and the beeper was not removed as the warrant required.

On August 22, customs officials began monitoring an aircraft emitting signals from a customs beeper. The target aircraft was periodically monitored by radar, sighted and followed by customs pilots, and intercepted when it landed. Customs officials then arrested Butts, the pilot of the target aircraft. Marijuana and other evidence was found on the aircraft.

Butts was charged with importing marijuana into the United States, 21 U.S.C. §§ 960(a)(1), 952(a), with possession of marijuana with intent to distribute it, 21

U.S.C. §§ 960(a)(1), 952(a), with possession of marijuana with intent to distribute it, 21 U.S.C. § 841(a)(1), and with carrying a firearm during the commission of a felony, 18 U.S.C. § 924(c)(2). Before trial, Butts moved to suppress all evidence obtained by customs agents as a result of their monitoring of the beeper on August 22 and 23, the two days on which Butts was piloting the aircraft.[1] The district court granted Butt's motion after conducting an evidentiary hearing. The government appealed the district court's order pursuant to 18 U.S.C. § 3731.

A divided panel of this court affirmed the suppression order of the district court. *United States v. Butts,* 710 F.2d 1139 (5th Cir. 1983). This holding was vacated by our action granting rehearing en banc. 5th Cir. Local R. 41.3.

II

In *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court developed the principles that currently control Fourth Amendment analysis:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a

1. The government did not challenge the district court's conclusion that Butts had standing to contest the installation of the beeper. The physical description of the pilot in the affidavit filed in support of the warrant matched Butts. The district court also found that Butts had possession and control of the aircraft sufficient to confer standing. We do not decide whether Butts had standing to challenge the admission of any incriimnating evidence derived from the installation of the beeper because his standing, or lack of it, does not affect the legality of the monitoring of the beeper or the applicability of the exclusionary rule—the only issues we reach today.

> subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected

Id. at 351, 88 S.Ct. at 511. The Court recently summarized these principles:

> Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. [Citations omitted.] This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U.S., at 361 [88 S.Ct. at 516],—whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." *Id.* at 351 [88 S.Ct. at 511]. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,' " *id., at* 361 [88 S.Ct. at 516],—whether, in the words of the *Katz*-majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.*, at 353 [88 S.Ct. at 512]. [Citations omitted.]

Smith v. Maryland, 442 U.S. 735, 740-41, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) (footnote omitted).

In *United States v. Knotts*, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), the Supreme Court applied these principles to the use of a beeper as a law enforcement surveillance technique. In *Knotts*, officers acting

without a warrant arranged with a chemical company to place a beeper inside a container of chloroform, which the company sold to a suspected illicit drug manufacturer. The officers then followed the vehicles in which the container was successively placed, maintaining contact both by visual surveillance and by monitoring the beeper. The officers lost the signal from the beeper for about an hour, but later relocated the signal, which was by then stationary at a site determined to be in or near Knott's cabin. The beeper was not used after officers determined that its signals indicated it had become stationary.

After watching for several days the cabin near which the beeper signals had come to rest, the officers used the tracking and beeper information to secure a search warrant for the cabin and found a drug factory. *Id.* at 1083-84. The district court denied Knott's motion to suppress the evidence based on the warrantless monitoring, and Knotts was convicted. On appeal, the Eighth Circuit reversed the conviction, concluding that the Fourth Amendment prohibited the warrantless monitoring. The Supreme Court reversed the Eighth Circuit.

The controlling significance of *Knotts* is that the Court's analysis of Knotts's Fourth Amendment rights separated its focus on the legality of the monitoring from the legality of the warrantless installation. The Court noted that Knotts did not challenge the installation because he believed he lacked the standing necessary to make such a challenge. In passing, it observed that some circuits, including ours, had approved warrantless beeper installations. Then, without resolving whether the *Knotts* beeper was placed in the vehicle in an unconstitutional manner, the Court moved directly to the issue of monitoring. It

concluded that because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," the use of a beeper to aid in monitoring or observing those movements was neither a search nor a seizure under the Fourth Amendment. *Id.* at 1085, 1087.

The beeper used in *Knotts* revealed no more than could have been learned by visual surveillance. The monitoring of the beeper did, however, enable police to determine the whereabouts of the item to which the beeper was attached after visual surveillance had failed. As to the ability of the officers to recapture the lost contact, the Court observed that "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise." *Id.* at 1087.

[2] *Knotts* teaches us here that monitoring signals from an electronic tracking device that tells officers no more than that a specific aircraft is flying in the public airspace does not violate any reasonable expectation of privacy. Because this is so, no Fourth Amendment violation results from such public detection. The movement of an airplane in the sky, like that of an automobile on a highway, is not something in which a person can claim a reasonable expectation of privacy. As the Eighth Circuit stated in *United States v. Bruneau,* 594 F.2d 1190 (8th Cir.), *cert. denied,* 444 U.S. 847, 100 S.Ct. 94, 62 L.Ed.2d 61 (1979):

> [W]hat is one's reasonable, subjective expectation of privacy in the airborne location of an airplane? There can be but one answer: none. Today as our airways become more congested, it is imperative that the location of all airborne planes, of every size and type, be carefully monitored. It is risking col-

> lision for an aircraft to surreptitiously venture forth into unassigned air space. For this reason, we do not believe anyone flying an airplane today can reasonably expect that he has a right to keep his flying, landing, or take off location private.

594 F.2d at 1196.[2]

Knotts deliberately left unanswered not only the question of whether the police conduct that made the monitoring possible violated the Fourth Amendment, but also the question of how such conduct, if illegal, will be dealt with. Butts does challenge the police conduct that made the monitoring of his aircraft possible. In doing so, however, he does not challenge the warrant or its extension. Instead, he bases his motion to suppress on the failure of an officer to carry out the magistrate's command to re-enter the aircraft on or before August 19 to remove the beeper. The panel majority asserted that this failure to remove the beeper within the period specified by the magistrate tainted the monitoring of the signal and that this taint invokes the exclusionary rule to bar all evidence obtained from tracking the aircraft to its landing site. 710 F.2d at 152. This position is untounded.

[3-5] The purpose of the exclusionary rule is to deter improper police conduct that violates a person's reasonable expectation of privacy under the Fourth Amend-

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2. The Supreme Court recently granted certiorari in *United States v. Karo*, 710 F.2d 1433 (10th Cir. 1983), *cert. granted*, ____U.S. ____, 104 S.Ct. 972, 79 L.Ed.2d 211 (1984). *Karo* concerns the warrantless installation and monitoring of a beeper attached to an object that was tracked onto premises where the defendant had a reasonable expectation of privacy. We need not withhold the decision in this case for the resolution of *Karo* since the surveillance by electronic signal of the interior of a private dwelling in that case is altogether distinguishable from the detection of the public travel identified here.

ment.[3] It does not purport to reach all illegal conduct by officers and is not applicable in the circumstances present here.[4] The action of the officer in installing the beeper did not result in discovery of any evidence at issue. Both the installation of and the failure to remove the beeper were unknown to Butts; therefore, neither the installation nor the nonremoval could have influenced Butt's decision to fly the aircraft in the public airspace. The signal from the then unwarranted beeper did nothing more than enhance the customs official's legal right to observe the aircraft's public movements. No Fourth Amendment right was infringed.[5]

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3. Judge Jolly's dissent emphasizes the deterrent effect of the exclusionary rule. At the same time, it concedes that had the beeper been attached to the aircraft without a warrant, the evidence would be admissible. This necessary concession would encourage an officer to act without securing a warrant to avoid any hazard of exclusion. This reasoning would not only subvert deterrence, but also directly conflict with Supreme Court precedent that prefers "police action taken under a warrant as against searches and seizures without one." *United States v. Ventresca*, 380 U.S. 102, 107, 85 S.Ct. 741, 745, 13 L.Ed.2d 684 (1965).

4. We deal in this case with a signal device that remained installed for only two days beyond the warrant-permitted period before it was monitored. As did the Supreme Court in *Knotts*, we pretermit any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms. *Seee Knotts*, 102 S.Ct. at 1086.

5. Judge Goldberg's dissent asserts that even if the actions of the customs officers were not a Fourth Amendment violation, the district court could have excluded the marijuana under its supervisory powers. The district court did not so rule and, in any event, should not have.

All cases in which the use of such power has been approved have required a balancing of competing interests. *See United States v. Hasting*, ____U.S.____, 103 S.Ct. 1974, 1979, 76 L.Ed.2d 96 (1983). Our balancing of interests in today's case produces a result opposite from Judge Goldberg's.

On the one hand, we have the public deprived of truthful evidence that a smuggler has brought a prohibited substance into the country.

[6, 7] No comparable application of the exclusionary rule is found in the precedent of the Supreme Court or this circuit. Cases tracing the taint of illegal police conduct all concern situations in which an effect of the original illegality provokes the defendant to a subsequent surrender of his Fourth Amendment rights or situations in which illegally obtained evidence enables police to collect private facts. For example, if an illegal arrest causes a defendant to give up other incriminating information before the effect of the prior arrest is attenuated, the exclusionary rule applies. *See Wong Sun v. United States,* 371 U.S. 471, 484-87, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963). If officers illegally obtain evidence of criminal conduct and then use that information in an affidavit that causes a warrant to issue for a search or seizure, the ostensibly legal, warranted invasion of privacy falls under the exclusionary rule. *See Alderman v. United States,* 394 U.S. 165, 176-77, 89 S.Ct. 961, 968-69, 22 L.Ed.2d 176 (1969). However, if following an illegal arrest the de-

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In addition, we have the evidence discovered not from any invasion of Butts's privacy but from detection of his public conduct. *Elkins v. United States,* 364 U.S. 206, 216, 80 S.Ct. 1437, 1443, 4 L.Ed.2d 1669 (1960), describes the 'general need for untrammeled disclosure of competent and relevant evidence in a court of justice." *United States v. Payner,* 447 U.S. 727, 736, 100 S.Ct. 2439, 2447, 65 L.Ed. 2d 468 (1979), speaks of the resulting detrimental effect of excluding such evidence.

On the other hand, we have proof that for two days past the time limit fixed by the magistrate a legally installed device remained inside an aircraft. We do not know precisely why it was not removed. The dissent describes the non-removal as "blatantly illegal" and "particularly egregious" conduct that evidences "complete disregard for a court order" and "reprehensible scorn for judicial authority." The record does not support these pejoratives. The installing agent testified he was absent from the area on National Guard duty when the warrant expired. We can know only that the beeper was not removed when the warrant required that it be. For all this record tells us, the presence of the beeper beyond the time limit well could have been due to illness, accident, inadvertence, or bureaucratic bungling.

fendant commits another criminal act in a public area, an officer who would not have seen the defendant but for the illegal arrest may testify to the criminality he later observes in a public place. The officer may also lawfully seize evidence derived from the commission of the subsequent criminal act. *See, e.g., United States v. Bailey,* 691 F.2d 1009, 1016-17 (11th Cir. 1982), *cert. denied,* ____U.S.____, 103 S.Ct. 2098, 77 L.Ed.2d 306 (1983); *United States v. Nooks,* 446 F.2d 1283, 1287-88 (5th Cir.), *cert. denied,* 404 U.S. 945, 92 S.Ct. 299, 30 L.Ed.2d 261 (1971).

[8] The exclusionary rule does not apply to deter wrongful or neglected official conduct that does not involve a breach of the Fourth Amendment. *See Stone v. Powell,* 428 U.S. 465, 486, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976); *United States v. Calandra,* 414 U.S. 338, 347, 94 S.Ct. 613, 619-20, 38 L.Ed.2d 561 (1974). This is illustrated by the Supreme Court's latest search and seizure case. In *Michigan v. Clifford,* ____U.S. ____, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984), the Court dealt with the admissibility of physical evidence obtained by arson squad investigators who arrived at a burned home well after firefighters, who had extinguished the blaze and departed, and as the house was being boarded up by persons employed by the homeowner's insurance company. Without a warrant, the arson squad entered the premises. They took possession of three gasoline cans and some pieces of ignition apparatus. The Michigan Court of Appeals excluded all the evidence as the product of illegal activity. *Id.* at 645. The Supreme Court affirmed the state court's holding that the arson squad was acting illegally in entering the defendant's property and searching his home at the time it did without a warrant. Despite the

illegality of the arson squad's presence on defendant's premises, the Court reversed the exclusion of one of the gasoline cans. This one can had earlier been found in the house by firefighters, but had been removed from the structure and placed in the driveway by a side door. Without detailing whether the can was visible from the public street, the Court held that the defendant's reasonable expectation of privacy in that can had been lost and that the arson squad could seize it for introduction in evidence. If the arson squad had not gone upon the premises illegally, they could not have taken possession of this can. Despite this "if," the Court reversed the exclusion of the evidence in which the defendant had no expectation of privacy, calling it "plain view" material both as with regard to its discovery by the firefighters and its subsequent seizure by the arson squad. *Id.* at 649-50.

REVERSED and REMANDED.

GARWOOD, Circuit Judge, concurring:

I concur in the result. While I agree with most of Chief Judge Clark's persuasive opinion, I write separately to emphasize that the case before us does not present a situation where the party seeking suppression was the owner or lessee of the airplane or had any significant proprietary interest in it.

Though the Government has not expressly challenged the district court's determination that Butts had "standing" to seek suppression of the evidence obtained by the tracking and subsequent search of the plane, this does not require us to treat the case as if the record reflected a state of facts which it plainly does not. The evidence shows that Butts piloted the plane on a trip from Castro-

ville to Seguin on June 18 and once again, over sixty days later, on a trip from Mexico into Castroville in the late evening of August 22 and early morning of August 23, and that when he was arrested on the latter occasion he "said he was ferrying this aircraft for someone from Seguin." There is no evidence, nor any concession by the Government here or below, that Butts ever was, or even claimed to be, the owner or lessee of the plane or that he had any proprietary interest in it.* Since *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), "standing is not a discrete question, separable from the substantive issues, in this character of case. Rather:

> ". . . definition of . . . [Fourth Amendment] rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing. . . .
>
> ". . . .
>
> "Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.* at 140, 99 S.C. at 428-29.

As the Court said in *Rawlings v. Kentucky,* 448 U.S. 98, 106, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980),

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* I note in passing that testimony by an accused at a suppression hearing cannot be used against him at trial on the merits save possibly for impeachment purposes. *See Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *United States v. Salvucci,* 448 U.S. 83, 93-94, 100 S.Ct. 2547, 2553-54, 65 L.Ed.2d 619 (1980).

"[a]fter Rakas" the standing and substantive issues "merge into one." And, in *Rakas* the Court likewise made clear that "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Id.* 439 U.S. at 130 n.1, 99 S.Ct. at 424 n.1.

The only substantial ground urged in support of Butts' motion to suppress is that the "beeper," which allowed the plane to be tracked when Butts flew it from Mexico to Castroville, had by then remained in the plane two or three days after the date by which the warrant extension order had directed that it be removed. Thus the sole question posed is whether the tracking of the plane under these circumstances "has infringed an interest of" pilot Butts "which the Fourth Amendment was designed to protect." *Rakas* at 140, 99 S.Ct. at 429. I would hold that it has not.

In *Rakas* the Court observed that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized or permitted by society." *Id.* at 143 n.12, 99 S.Ct. at 430 n.12. Whatever may be the case with respect to monitoring what is present, said or done on board an aircraft, I do not believe that "understandings that are recognized or permitted by society" serve to "legitimate" the expectations of a pilot, having no proprietary interest in the aircraft, that its movements through the *public* airways will not be tracked by an unauthorized device affixed to the interior of the plane. The presence of such tracking device may invade the property rights, and perhaps the legitimate expectations of privacy arising

therefrom, of one having a proprietary interest in the plane, but that is not the situation before us.

In the analogous case of *United States v. Parks,* 684 F.2d 1078 (5th Cir. 1982), we stated:

> "But even if [the pilot] Holloway had been legitimately piloting the plane and in possession of its key on April 27, any illegality in the maintenance and monitoring of the beeper would not have infringed any interest of his that the Fourth Amendment was designed to protect.
>
> ". . . .
>
> "The lawlessness *vel non* of the physical presence of the beeper affects the legitimation of Holloway's expectation of privacy only insofar as such expectation can be said to have a source in his property rights. But Holloway has not established that he had any ownership or proprietary rights sufficient for such purpose. Holloway must accordingly base the legitimation of his expectation of privacy on 'understandings that are recognized and permitted by society.' *Rakas v. Illinois, supra.* . . . [Those understandings do not furnish a legitimate expectation of privacy in the movements of an airplane through the public airways." *Id.* at 1085, 1087.

In my view, such an approach does not give undue significance to property rights. *Rakas,* though refusing to allow "arcane distinctions developed in property and tort law" to "control" for Fourth Amendment purposes, *id.* 439 U.S. at 143, 99 S.Ct. at 430, nevertheless recognizes that:

> ". . . by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property con-

> cepts in determining the presence or absence of the privacy interests protected by that Amendment. No better demonstration of this proposition exists than the decision in *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), where the Court held that an individual's property interest in his own home was so great as to allow him to object to electronic surveillance of conversations emanating from his home, even though he himself was not a party to the conversations." *Id.* at 143-44 n.12, 99 S.Ct. at 431 n.12.

And, while it is of course true, as Justice Stewart stated for the Court in *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967), that "the Fourth Amendment protects people, not places," nevertheless it is also true that *what* it protects people from is invasion of "[t]he right . . . to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). Moreover, Justice Stewart was likewise careful to state in *Katz* that the protections of the Fourth Amendment are neither limited to nor as extensive as the protection of privacy:

> ". . . the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but *its protections go further, and often have nothing to do with privacy at all.* Other provisions of the Constitution protect personal privacy from other forms of governmental invasion." *Id.* at 351, 88 S.Ct. at 511 (emphasis added, footnotes omitted).

The "wrong" or "infringement" here is the agents' failure to comply with the requirement of the warrant ex-

tension order that the "beeper" be removed by not later than August 19. Butts never claimed, nor was shown, to have ever had any proprietary interest in the plane. Therefore, as stated by the panel dissent, "Butts was not a victim of that infringement." *United States v. Butts,* 710 F.2d 1139, 1154 (5th Cir. 1983). Accordingly, Butts' Fourth Amendment rights were not violated, and his motion to suppress should not have been granted. We need decide no more.

GOLDBERG ,Circuit Judge, with whom POLITZ and TATE, Circuit Judges, join dissenting:

The majority apparently hears the death knell of the exclusionary rule; today's holding swiftly propels that part of our jurisprudence towards its final demise. But I will not be a pallbearer yet—not until the Supreme Coroners have plainly pronounced the exclusionary rule dead. Continuing to adhere to the original panel decision in this case, I retract not a syllable from that original opinion. And, while I wholeheartedly concur in the dissent of my brother, Judge Jolly, my disagreement with the majority's result and reasoning extends further than his. I pause, therefore, to express a few more paragraphs in support of the ideas articulated in the panel opinion and to provide an alternative rationale for the panel's result.

I.

The en banc court's majority holding, as expressed in the first two sentences of the opinion, is not especially troubling. Under the facts of this case the *act of monitoring* the beeper's signal did not itself constitute an unreasonable search or seizure. The legitimate 4th Amendment inquiry, however, does not end there. This case

involves much more than an act of monitoring. Questions concerning the physical presence of the device within a zone of privacy call out loudly for our attention. In order to make possible the tracking of an airplane by means of an electronic device, a customs agent intruded into the interior of a plane and installed a beeper. A warrant authorized that intrusion, but the beeper remained inside the plane past the time that the warrant allowed. Electronic tracking of the plane, in the period after the warrant's expiration, produced evidence that was used to prosecute Butts.

As we held in the panel opinion, the beeper's continued, unauthorized, physical presence inside the plane violated the defendant's 4th Amendment rights. Individuals should be able to reasonably expect that monitoring instrumentalities of the state will not be present in their protected zones of privacy. For a beeper is more than just the signal that it emits. It is both tangible and symbolic. It constitutes a continuing, constructive presence of the state. The federal officer's initial intrusion into the vehicle interior, required to affix the tracking device, endured as long as the beeper remained.

Today's majority fails to come to grips with, indeed fails to even address, this assault on 4th Amendment protections. This failure flows from a singular emphasis on the *United States v. Knotts,* ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), and that case's *limited* approval of warrantless beeper monitoring. Coupled with the majority's narrowing of *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and the poisonous fruits doctrine, the emphasis on the act of monitoring produces what I believe is an incredible result.

Three major flaws exist in the majority's train of reasoning. First, the majority's analysis fails to recognize that the various procedures necessary for gathering beeper evidence all work to achieve a single end. While these procedures are indeed separable into installation, maintenance and monitoring components for purposes of some Fourth Amendment analyses,[1] the activities are not separable in terms of their real-world, law enforcement function. Beeper procedures serve a single goal each time they are implemented—i.e., the gathering of evidence that will lead to the arrest and conviction of suspected criminals. A constitutional violation in any of the procedures taints the beeper evidence; for without each procedure the evidence cannot be obtained. Any meaningful constitutional review of the gathering of evidence through the use of beepers must take account of all component procedures. The violation of the Constitution in this case arose out of the maintenance component. Maintaining the beeper inside the plane past the period permitted by the warrant was just as necessary to the law enforcement objectives as was the act of monitoring. Failure to recognize the single, overarching function of beeper procedures and failure to scrutinize each procedure for possible illegality has today allowed a constitutional violation to pass without redress.

The majority's reasoning is also flawed because the scope of the exclusionary rule and the poisonous fruits doctrine is not nearly so narrow as today's decision paints it. *Wong Sun v. United States, supra,* commands the exclusion of evidence "come at by the exploitation" of illegality. 371 U.S. at 488, 83 S.Ct. at 417 (1963). In this case, there exists both a casual relationship and a link of

1. See Majority Opinion p. 1516.

purposive behavior by law enforcement officers connecting the illegality to the evidence at issue. But for the installation and continued illegal presence of the beeper, agents would not have come into possession of the tracking information or the physical evidence seized on Butts's arrest. *Knotts's* comparison of beeper monitoring to visual surveillance, to decide an issue concerning the act of monitoring, does not deny the reality that beepers allow police to obtain evidence that they would otherwise be unable to obtain. Much more than just a "but for" relationship, however, exists between illegal beeper procedures and the evidence at issue. The specific purpose of the entire beeper tracking process was realized in Butts's arrest and the seizure of evidence. Moreover, nothing—no passage of time, no act by the defendant, no act by law enforcement officers—appears to purge the illegality tainting that evidence. Indeed, it is hard to imagine a more direct or solid link between the customs official's violation of the law and the evidence at issue.

Precedent, relied on by the majority in narrowing *Wong Sun*, has a very different import in my mind. The analogy drawn between the circumstances in this case and those in *United States v. Bailey*, 691 F.2d 1009, 1016-17 (11th Cir. 1982), *cert. denied*, ____U.S.____, 103 S.Ct. 2098, 77 L.Ed.2d 306 (1983) and *United States v. Nooks*, 446 F.2d 1283, 1287-88 (5th Cir.), *cert. denied*, 404 U.S. 945, 92 S.Ct. 299, 30 L.Ed.2d 261 (1971), will not withstand analysis. Both of the latter cases admit evidence obtained subsequent to an illegal arrest. In each case, though, the link between police illegality and the evidentiary fruits was attenuated by the defendant's commission of a second crime. In fact, *Bailey* distinguishes a line of cases that suppress evidence and depend in part on "but

for" causation between police illegality and discovery of evidence. *Bailey* actually acknowledges the "but for" causality factor as relevant in *Wong Sun* analyses. 691 F.2d at 1014 n.3. Despite the existence of a "but for" link in *Bailey*, Judge Anderson found that the commission of a new crime mandated an exception to the traditional *Wong Sun* analysis. In explaining the rationale of its ruling and rationale of this circuit's decision in *Nooks*, *supra*, the court declared:

> Unlike the situations where in response to the unlawful police action the defendant merely reveals a crime that *already* has been or is being committed, extending the fruits doctrine to immunize a defendant from arrest for *new* crimes gives a defendant an intolerable *carte blanche* to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police conduct.

Id. at 1017. The "high price" incurred when a suspect commits further criminal acts is not relevant in the instant case. Rather, this case parallels closely the cases distinguished in *Bailey*, where the Fifth Circuit suppressed fruits of police misconduct. *See United States v. Beck*, 602 F.2d 726 (5th Cir. 1979) (The court suppressed evidence where an illegal stop of a vehicle resulted in defendant's tossing marijuana out of the window); *Fletcher v. Wainwright*, 399 F.2d 62, 64-65 (5th Cir. 1968). (That stolen jewelry was found in a public area was irrelevant and did not render the search outside of the Fourth Amendment. The jewelry had been thrown from a motel window into the courtyard in response to an

illegal entry into the defendant's motel room.) It is *United States v. Beck* and *Fletcher v. Wainwright,* rather than *Bailey* or *Nooks,* that control the instant case.[2] The evidence aganist Butts was the fruit of illegal law enforcement conduct. It was properly suppressed by the court below.

A third flaw in the majority's analysis derives from the emphasis on information conveyed by the beeper. Focusing only upon the incriminating evidence itself, this kind of reasoning reveals an ironic fetishism. Under the majority's interpretation of *Wong Sun,* unless the evidence exudes a special aura that places it into a class of protected matter, the exclusionary rule does not apply. Such an approach turns the exclusionary rule on its head, making the rule appear as an end rather than as a means

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2. *Michigan v. Clifford,* _____U.S._____, 104 S.Ct. 641, 78 L.Ed. 2d 477 (1983) is not to the contrary. That case holds that the existence of reasonable privacy interests in a fire damaged home impose a warrant requirement on post-fire arson investigations inside the home. The Supreme Court upheld exclusion of evidence found during a warrantless search of the home's basement and upper areas. The Court did not require suppression of a fuel can, discovered by firefighters and subsequently placed in plain view in the home's driveway. With regard to that can, the Court's comments were brief:

> One of the fuel cans was discovered in plain view in the Clifford's driveway. This can was seen in plain view during the initial investigation by the firefighters. It would have been admissible whether it had been seized in the basement by the firefighters or in the driveway by the arson investigators. Exclusion of this evidence should be reversed.

Id. at _____, 104 S.Ct. at 649-50.

I can find no discussion to support the *Butts* majority's conclusion that "if the arson squad had not gone upon the premises illegally, they could not have taken possession of this can." Majority Opinion at 1519. Furthermore, I cannot read this cryptic passage by Justice Powell (joined by Justices Brennan, Marshall and White) as making the substantial reduction in Fourth Amendment protections suggested by today's majority. Had the Court intended to impose such a sweeping change in the *Wong Sun* doctrine, it surely would have been much more explicit.

to an end. The exclusionary rule exists primarily to ensure compliance with the Fourth Amendment. And, the Amendment's purpose is plain from its language: to protect "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Losing sight of the constitutional value to be protected and the law's role in protecting that value can lead nowhere but to a wrong result. The costs of that wrong result are today visited upon defendant Butts and upon the whole of society.

II.

Constitutional values aside, but not forgotten a second justification exists for the district court's suppression of the evidence in this case. Based on his inherent supervisory power, the district judge acted properly in excluding the beeper evidence. The magistrate who had authorized installation of a beeper in the airplane included a clear and unequivocal command in the warrant: "You are also directed to remove the transponder from the aircraft no later than 30 days from the expiration of the *original* court order." While the customs agent sought and received one extension of this 30 day limit, he failed to carry out the warrant's instruction after that extension expired. The magistrate's command, carrying the force of law, gave the defendant a *legal interest* in removal of the beeper. As a direct result of violating federal law, and in derrogation of the defendant's interest, officers were able to obtain evidence against Butts.

The supervisory power is a well established means by which federal courts deter violation of nonconstitutional law. *See United States v. Payner*, 447 U.S. 727, 736 n. 7, n. 8, 100 S.Ct. 2439, 2446-47 n. 7, n. 8, 65 L.Ed.2d

468 (1980); *Rea v. United States,* 350 U.S. 214, 217-218, 76 S.Ct. 292, 294-95, 100 L.Ed. 233 (1956); *McNabb v. United States,* 318 U.S. 332, 341-42, 63 S.Ct. 608, 613-14, 87 L.Ed. 819 (1943); Exercise of that power frequently takes the form of excluding evidence from use in criminal trials. *See, e.g., Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *Mesarosh v. United States,* 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956); *McNabb v. United States, supra,* 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819; *United States v. Cortina,* 630 F.2d 1207 (7th Cir. 1980); *United States v. Valencia,* 541 F.2d 618 (6th Cir. 1976); *see generally* "Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1982-83," 72 Geo. L.J. 355 (1983). In *McNabb v. United States, supra,* 318 U.S. at 341-342, 63 S.Ct. at 613-14, the Supreme Court declared:

> The principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioner in the circumstances disclosed here must be excluded. For in the treatment of the petitioners, the arresting officers assumed functions which Congress has explicitly denied them.
>
> The circumstances in which the statements admitted in evidence against the petitioners were secured revealed a plain disregard of the duty enjoined by Congress upon federal law officers. . . .

> [T]o permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law [citations omitted].

318 U.S. at 341-45, 63 S.Ct. at 613-15.

A situation similar to the one that produced the *McNabb* decision exists in the case at bar. An individual has been prosecuted with evidence obtained in violation of federal law. The only difference is that the instant case involves a command from the judicial branch rather than a command of Congress. That difference hardly mandates a different result than the one reached in *McNabb*. Respect for and enforcement of court made law constitutes an important value, as worthy of protection as the mandates issuing from a coequal branch of government. *See Rea v. United States, supra,* 350 U.S. at 217-18, 76 S.Ct. at 294-95. (Discussing a violation of the Federal Rules of Criminal Procedure the Court declared that, "federal courts sit to enforce federal law" and "federal law extends to the process issuing from those courts.")

Admittedly, in recent cases the Supreme Court has cautioned against overzealous use of the supervisory power in reversing criminal convictions. For example, *United States v. Payner, supra,* 447 U.S. at 735, 100 S.Ct. at 2446, noted that the supervisory power should be applied "with some caution," carefully weighing the interests in preserving judicial integrity and in deterring illegal conduct against the societal interest in presenting probative evidence to the trier of fact. However, in the same case the Supreme Court observed that its decision "does not limit the traditional scope of the supervisory power in

any way; nor does it render that power 'superfluous.' " *Id.* at 735-36 n. 8, 100 S.Ct. at 2446-47 n. 8.[3]

I believe that the balancing process in this case requires us to uphold the exclusion of evidence. On one side weighs the important interest always relevant in questions of exclusion: putting probative evidence of the defendant's guilt, the confiscated marijuana, before the trier of fact. But, against that we balance the deterrence of blatantly illegal conduct by law enforcement officers. Here the conduct to be deterred is particularly egregious. A customs agent failed to obey the direct and unequivocal command of a federal magistrate. His actions manifested a complete disregard for a court order. Good faith on the part of that official was notably absent. *See United States v. Williams,* 622 F.2d 830, 841 (1980), *cert. denied,* 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114. (A good faith belief must be grounded in objective reasonableness.)[4] Overall, in view of the necessity of discouraging such reprehensible scorn for judicial authority, the scale tips towards excluding the evidence. We should uphold the district court's suppression of the evidence.

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3. The holding of *Payner* is not controlling in today's case. *Payner* held that the balance of values titlted towards admission of the "tainted" evidence when the defendant was not himself the victim of the challenged practices.

Nor does the Court's recent decision in *United States v. Hasting,* _____U.S._____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) suggest that invocation of the supervisory power in this case would be inappropriate. *Hasting* noted that the existence of "means more narrowly tailored" than exclusion of evidence to deter illegality cut against exclusion. However, the decision actually rested upon the fact that the illegality at issue constituted harmless error in the defendant's trial.

4. The existence of good faith, in fact, has been found to be controlling in previous balancings to determine the appropriateness of exclusion. *United States v. Caceres,* 440 U.S. 741, 757-58, 99 S.Ct. 1465, 1474-75, 59 L.Ed.2d 733 (1979).

Adapting our Fourth Amendment jurisprudence to constantly evolving, high technology techniques of law enforcement presents a difficult challenge. We must not close our eyes to possible illegality in such methods just because certain of their component procedures do not violate the law. The potential for seriously eroding respect for the law may well lurk in the other procedures necessary to implementing these ultra-modern police techniques. Today's decision shirks the challenge before us. It beckons a future in which the citizenry's rights to privacy and security will lie atrophied beyond recognition. I must respectfully dissent.

E. GRADY JOLLY, Circuit Judge, with whom GOLDBERG, POLITZ, TATE and WILLIAMS, Circuit Judges, join, dissenting:

I.

To me, the facts of this case upon first reading, left the impression, immediately and intuitively, that the evidence should be suppressed under the general principles of the exclusionary rule. Yet, the panel's analysis, scholarly though it is, gave the impression of a hunt in which the quarry had eluded the hunters. Now we have a majority opinion which is, oddly, so very right and so very wrong—right that the fourth amendment, under the current jurisprudence, does not directly protect the emission of the electronic signal here;[1] wrong that that issue is central at all to a determination of whether the marijuana is unconstitutionally tainted.

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1. While the actual monitoring of the signal is not subject to proscriptions of the fourth amendment, it is evidence which may be tainted, and hence inadmissible, as a result of its emanation from a "poisonous tree."

The issue, I think, is simple and straight-forward. The marijuana is the fruit of a fourth amendment wrong committed by the government, that is, the breach of the search warrant. The seizure of the marijuana was brought about by the government's exploitation of its wrong; and it is equally clear that the seizure of the marijuana is not so "attentuated" from the breach of the warrant that the taint of the fourth amendment wrong is "dissipated."

II.

A search warrant was sought by the government agent to permit an intrusion into the cockpit of the airplane for the purpose of the installation of the transponder based on probable cause that the plane was being used in narcotics traffic.[2] The district court issued a search warrant authorizing the search, but providing several conditions to the search, among them that the "[t]ransponder or beeper to remain in aircraft for a period not to exceed thirty days."[3] On the basis of this search warrant, one night

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2. I assume, since the majority does not contest the proposition, that there is no disagreement that Butts had a reasonable expectation of privacy in the cockpit of the plane and that the search warrant obtained was necessary to invade that privacy to "search and install" the transponder behind the instrument panel.

It is true that Butts did not own the plane. A person, however, may have a legitimate expectation of privacy in a place or object he does not own. *United States v. Salvucci*, 448 U.S. 83, 92, 100 S.Ct. 2547, 2553, 65 L.Ed.2d 619, 629 (1980); *United States v. Reyes*, 595 F.2d 275, 278 (5th Cir. 1979). Butts met his burden of showing that his exercise of possession and control of the plane evidenced a legitimate expectation of privacy which was infringed by the installation and continued presence of the beeper. Moreover, on appeal, there was no contention that Butts lacked standing to complain of the use of the beeper.

3. Whether the intrusion into the cockpit of the plane for the purpose of installing a beeper is a search, seems to be answered here, as a matter of fact, by this particular search warrant which com-

shortly after its issuance, at about 9:00 p.m., two government agents went to the airport where the plane was parked and in the cover of night, opened the main cabin door of the aircraft, entered into the cockpit of the airplane, and installed the transponder—all under the authority of the search warrant.

Under the terms of the warrant, the transponder was to be removed on July 19, 1981. The agents allowed the warrant to expire without removing that transponder. Two days after the thirty-day period had elapsed, customs agents, on July 21, 1981, asked the magistrate to extend the original warrant. This second warrant specifically ordered the agents: "You are also directed to remove the transponder from aircraft N4926B no later than 30 days from the expiration of the original court order (expiration date 07/19/81) that authorized the installation of the electronic equipment." At the end of this second thirty-day period, notwithstanding the explicit command of the court, the transponder remained inside the plane as an active tracking device in violation of the explicit conditions of the warrant which had authorized the search.

As a result of the transponder's remaining in the aircraft in violation of the conditions of the warrant, evidence of the plane's location was obtained, the plane was tracked into Mexico and back into the United States, and upon return, shortly after landing, its pilot was arrested by customs officials who seized the bale of marijuana upon which this prosecution is based.

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mands the government agent to "*search* and install said transponder and/or tracking beacon (beeper) . . ." in the airplane. (Emphasis added.)

III.

In determining whether the marijuana in this case must be excluded as the inadmissible fruit of the poisoned tree, we turn first to the progenitor of this doctrine, *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) and examine the facts in that case. There the federal narcotics agents arrested Hom Way, finding heroin in his possession. He stated that he had bought heroin from Blackie Toy. The agents, without probable cause, invaded Toy's bedroom and arrested him. He denied selling narcotics, but implicated Johnny Yee as someone who had sold the contraband. The agents then entered Yee's residence and he voluntarily surrendered to them an ounce of heroin in his possession. Yee was arrested, and along with Toy, taken to the office of the Bureau of Narcotics where they implicated Wong Sun as a seller of heroin. Toy, Yee and Wong Sun were duly charged, arraigned and released on recognizance. Within a few days each was interrogated at the bureau where they gave incriminating statements.

When considered by the Supreme Court, at issue was the admissibility of: (1) the statements made by Toy in his bedroom, (2) the heroin obtained at Yee's apartment, (3) Toy's post-arrest statement, and (4) Wong's post-arrest statement. The Court held that Toy's statement made in his bedroom was the fruit of the unconstitutional invasion into his living quarters and was thus inadmissible. The Court further held that the exclusion of Toy's bedroom declaration required the exclusion of the narcotics taken from Yee as the fruit of the unlawful invasion into Toy's living quarters and could not be used against Toy. In holding that the narcotics were the fruit

of the unlawful invasion into Toy's quarters, the Court noted that the prosecutor had admitted that the drugs would not have been found except for the help provided by Toy in his bedroom declaration. The Court specifically noted that under these facts it could not be said that the narcotics were evidence derived from an independent source, nor was it a case in which the connection between the police misconduct and the evidence had become so attentuated as to dissipate the taint.

In evaluating the evidence that follows illegal police misconduct, the test to apply is not, Justice Brennan wrote, whether the evidence would have come to light "but for" the illegal actions of the police; rather, the question to be determined is whether the evidence results from exploitation of the illegality or whether it results from means sufficiently distinguishable from the illegality so as to be free of the initial taint. Applying that test, the Court concluded that the narcotics surrendered by Yee were the poisonous fruit of the unlawful invasion of Toy's living quarters. The narcotics were, the Court held, the result of the exploitation of that original illegality and could not be introduced into evidence against Toy.

Turning to the two remaining issues of the post-arrest statements, the Court found it unnecessary to rule whether Toy's post-arrest statement was the fruit of the illegal arrest. Regarding Wong, however, the Court, while agreeing with the lower court that his initial arrest was illegal, held that his confession, made several days later while free on his own recognizance, was properly admitted. Since he was on his own recognizance and had voluntarily returned to the bureau several days later to make the statements, the connection between his initial arrest and

the subsequent confession had "become so attentuated as to dissipate the taint." *Id.* at 419.

Whether the connection between the illegal conduct and the questioned evidence is attenuated is largely a fact question to be determined and evaluated in each case. Our court, however, has undertaken such an evaluation on two rather recent occasions, and provided some factors to be considered. In *United States v. Brookins,* 614 F.2d 1037 (5th Cir. 1980), Judge Vance (now of the Eleventh Circuit) wrote extensively on the subject. He pointed out that *Wong Sun, supra,* barred the fruits of the poisonous tree only if the fruit is sufficiently connected to the "illegal tree" *Brookins,* 614 F.2d at 1041. He outlined three forms of insufficient connection: where the link between the illegal conduct and the subject evidence had become attenuated; where the evidence had an independent source apart from the illegal conduct; and where the evidence inevitably would have been discovered during the police investigation without the aid of the illegal source. It was the court's task in *Brookins* to evaluate the attenuation of the connection between illegal police conduct and a witness whose name was adduced in the illegally obtained statement and whose testimony the defendant sought to suppress. Among the factors considered were whether the testimony was the act of the witness's own free will; whether substantial time periods had elapsed between the illegal conduct and police contact with the witness; whether the identity of the witness would have been discovered by the police in a routine investigation, and whether the illegal conduct of the police in the first place was innocent or wilful. Even if the consideration of these factors indicated that the evidence was not attenuated from the illegal conduct, the court

must weigh the application of the exclusionary rule against the social costs of suppressing the evidence, and in particular, the court should determine whether the application of the exclusionary rule provided some deterrent effect on the behavior of police officers. *Id.* at 1043.[4]

Obviously, most of these factors do not fit the facts of the case we consider here today, and simply underscore our earlier statement that whether the subject evidence has become so attenuated from the illegal conduct of the police is a fact question to be evaluated in each case. Perhaps of more significance to our consideration is the emphasis that Judge Vance gave, in the context of applying the fruit-of-the-poisoned-treet doctrine, to the general purpose of the exclusionary rule. He noted that recent Supreme Court decisions make it clear that the exclusionary rule does not rest upon the Constitution, but rather is a judicially created remedy to be applied only when it advances its judicial purpose. *Id.* at 1046. He further noted that the single and distinct purpose of the exclusionary rule is deterrence of police violations of that constitutional protection against unreasonable searches and seizures. *Id.* at 1047.

A second recent case dealing with the subject we discuss today is *United States v. Tookes,* 633 F.2d 712 (5th Cir. 1980). Tookes was an individual known to police as a convicted felon and drug offender. When the police approached him, he ran, was caught by the police, frisked

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4. In delineating the three forms of inadequate connection between fruit and tree, Judge Vance relied on four Supreme Court decisions: *United States v. Ceccolini,* 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); and *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

from head to toe, found clean, but arrested anyway. The police officer began searching the area for anything that Tookes could possibly have thrown away while being chased. The officer's search took him back to the vicinity of Tookes' truck where he observed from the outside and in plain view on the seat next to the driver, a semi-automatic pistol. The defendant was then placed under arrest again, this time for possession of a firearm by a felon. At trial, Tookes moved to suppress the gun as the fruit of the illegal first arrest. Judge Roney, writing for the court, held that the connection between the unlawful arrest and the seizure of the gun was not attentuated. He noted three factors to be considered in determining whether there was sufficient connection between the illegal conduct and the questioned evidence: (1) the proximity of the two in time and distance; (2) the presence of intervening circumstances between the arrest and the discovery of the evidence, and (3) the circumstances under which the arrest was made. He noted that the discovery of the evidence was soon after the arrest had been made and that there had been no sifinificant intervening circumstances. He emphasized that the arrest was a gross violation of legal processes and the taint could not thus easily be removed. He admitted that the gun was in plain view and conceivably could have been discovered in the absence of the arrest but found that the "temporal" and "spatial" proximity of the illegal conduct and the discovery of the evidence made it clear that the two were interrelated. *Id.* at 716.[5]

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5. This same method of determining whether evidence falls within the general exclusionary bar against use of the fruits of an unlawful search, arrest, or seizure was used in *United States v. Miller*, 666 F.2d 991, 995 (5th Cir. 1982).

IV.

In determining the admissibility of the marijuana in this case, we turn to *Wong Sun* as the primary authority for our analysis. *Wong Sun* tells us that the facts are not to be analyzed pursuant to the approach that "but for the illegal conduct the evidence would never have been adduced"; rather, we are to determine whether the evidence here arises from the government's exploitation of the warrant's breach and whether the connection between the warrant's breach and the marijuana is so attenuated that the illegal taint has become dissipated. Both *Brookins, supra,* and *Tookes, supra,* though in parts irrelevant to the facts we must examine today, are helpful in giving us some understanding of how we have discussed and applied the *Wong Sun* doctrine in other cases in this circuit.

First, we compare the fourth amendment wrong in *Wong Sun* and in our case. In *Wong Sun,* the fourth amendment wrong was the unlawful invasion into his living quarters without a search warrant and without probable cause to believe that Wong Sun had committed a crime. In our case, there were no exigent or emergency circumstances, and the government agents properly went to the magistrate and applied for a search warrant. The court issued the search warrant permitting the agents to intrude into the cockpit of the plane at nighttime to "search and install said transponder and/or tracking beacon (beeper)." The terms of the warrant expressly provided that "[t]ransponder or beeper to remain in aircraft for a period not to exceed thirty days." A thirty-day extension of the warrant was granted. In granting the extension, the court specifically directed the customs agents to remove

the transponder at the end of that period. The court said in effect, to the government agents: it is reasonable to surreptitiously enter the plane, go into the cockpit, and install the transponder *if* you allow it to remain no longer than thirty days; if the tracking device remains in the plane longer than thirty days, this invasion scheme, which you seek to use as an investigative tool, is unreasonable.

The second thirty-day period expired on August 19, 1981. Three days later the transponder emitted the evidence leading to the location and seizure of the marijuana. Giving the term "exploit" its commonly accepted meaning of "taking advantage of" or "using," there should be no quibbling that the government agents exploited their failure to act in accordance with the terms of the warrant. The government agents had been ordered by the court to remove the transponder, they had failed to act according to the terms of the warrant; because they had breached the terms of warrant, evidence, i.e., electronic emissions indicating the plane's location, came into their possession; they immediately began acting on that evidence by tracking the plane; and ultimately, based on the evidence emitted in violation of the warrant, that is, emitted after the expiration of the thirty-day period, they located the marijuana. This conduct is exploitation of a fourth amendment wrong, in the clearest sense.

Furthermore, when we compare the chain of evidence in this case with that set out in *Wong Sun,* it is clear here that between the fourth amendment wrong and the evidence seized there is no attenuation which can be said to dissipate the taint. The chain of evidence is almost identical to that in *Wong Sun.* In *Wong Sun,* heroin was obtained from Yee because his location was known because of a statement that was given by Toy which resulted

from the fourth amendment wrong of the police. Here, the marijuana was seized because the police knew of its location because of the electronic signal which resulted from a fourth amendment wrong of government agents. Thus, from the juxtaposition of the facts in this case with those in *Wong Sun*, it is clear that the authority of that case is "on all fours" that the subject evidence here was not attenuated from the breach of the warrant and the misconduct of the government in failing to remove the transponder.

While certainly it is clear that we need go no further than the authority of *Wong Sun*, we do note in passing that, when applying the relevant criteria noted in *Brookins, supra*, and *Tookes, supra*, the evidence here does not fit into any of the categories which should be expected from the fruit-of-the-poisonous-tree doctrine. There was no significant amount of time which passed between the fourth amendment violation and the seizure of the evidence; there is no indication whatsoever in our case that the evidence would have been discovered by the police in the absence of the breach of the warrant; the breach of the warrant did not result from innocent activity on the part of the police who were, at best, wilfully negligent in complying with the terms of the warrant.

Finally, *Brookins* emphasizes as a major consideration the effect the exclusion of the evidence will have on discouraging illegal conduct on the part of law enforcement officers. In this regard the exclusion of the evidence here serves a major purpose. The majority opinion allows police to ignore the conditions of reasonableness imposed on their conduct by court-issued search warrants without adverse consequence. Under the court's ruling today,

police officers may, with immunity, allow transponders to track the comings and goings of an individual indefinitely, notwithstanding what the judge says. Court enforcement of protections against invasions through electronic devices is difficult enough to control effectively without further diluting the relevance of the fourth amendment as does the holding of the majority today. Thus, to me, application of the exclusionary rule to the marijuana in this case is all the more important for the effect it will have on future police conduct.

V.

In conclusion, I must dissent from the majority's opinion. I should make it clear that I do not disagree that the fourth amendment does not protect Butts from the monitoring of the transponder in his airplane. I agree that Butts had no expectation of privacy to be free of the tracking of his plane in the airways. If the transponder had been warrantlessly attached to the exterior of the plane, I would have no occasion to complain about the admissibility of the evidence here in question. But the majority does not only focus on the monitoring as the source of the marijuana, it treats the monitoring as though it were an isolated, independent act without a history preceding it. The majority ignores that the monitoring and the recovery of the marijuana resulted from an exploitation of a fourth amendment wrong, the failure of the agents to comply with the specific conditions and terms of the search warrant. That is my difference with the majority, and that is why I dissent.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

v.

Harold Dean BUTTS,
Defendant-Appellee.

No. 82-1260.

United States Court of Appeals,
Fifth Circuit.

Aug. 1, 1983.

Opinion on Granting of Rehearing En Banc
Oct. 25, 1983.

Government appealed from an order of the United States District Court for the Western District of Texas, Dorwin W. Suttle, J., which suppressed evidence obtained as a result of monitoring of beeper installed inside aircraft defendant was piloting. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) physical attachment of electronic "beeper" to interior of aircraft constituted a "search" within meaning of Fourth Amendment, and (2) where beeper installed inside aircraft pursuant to valid search warrant remained present in aircraft after expiration of court order authorizing its installation and maintenance, evidence obtained as a result of beeper's continued presence inside aircraft after warrant expired was properly suppressed, since beeper's presence was then unlawful.

Affirmed.

Clark, Chief Judge, dissented and filed an opinion.

Sidney Powell, Asst. U.S. Atty., San Antonino, Tex., for plaintiff-appellant.

Gerald H. Goldstein, Robert B. Hirschhorn, San Antonio, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

Use of the electronic tracking device, or "beeper," raises novel and difficult fourth amendment problems. This case presents such an issue. The government appeals from the district court's grant of a motion to suppress all evidence obtained from a beeper installed and maintained in the interior of a plane beyond the time limit set in a court order. We affirm.

I. FACTS AND PROCEEDINGS BELOW

A. Facts

On June 19, 1981, U.S. Customs pilot Lawrence R. Nichols executed an affidavit requesting court authorization to install and maintain an electronic tracking device within a twin-engine Beechcraft bearing the registration number N4926B. The affidavit included allegations indicating that the aircraft might be used to import marijuana into the United States from a foreign country. On the basis of the information contained in the affidavit, U.S. Magistrate Jamie Boyd issued a warrant authorizing the installation. The warrant provided as follows:

> You are hereby commanded to search forthwith and to install appropriate electronic aircraft tracking equipment, limited to a transponder and/or beeper, in the aforedescribed aircraft serving this warrant and complying with this order at any time of the day or night within ten days and to return this warrant specifying the date of installation. Transponder or beeper to remain in aircraft for a period not to exceed thirty days.

Record on Appeal, Government Exhibit 6. Pursuant to this warrant, U.S. Customs pilot Gerald Weatherman installed the beeper in the aircraft. At 10:45 p.m. on June 19, 1981, while the aircraft was parked at the airport in Seguin, Texas, Weatherman entered the cabin of the aircraft and secreted the beeper in its interior.

The original warrant authorizing installation and maintenance of the beeper expired on July 19, 1981. Two days later, on July 21, 1981, Weatherman appeared before Magistrate Boyd seeking an extension of the original authorization. In requesting the extension, Weatherman executed no additional affidavit and relayed no additional material facts to the court. Nevertheless, Magistrate Boyd granted the extension request. The extension order provided as follows:

> YOU ARE HEREBY GRANTED an extension forthwith on the above described Beechcraft B-50 aircraft, bearing registration number N4926B, a transponder signaling device to remain on aircraft N4926B for a period of 30 days. You are also directed to remove the transponder from aircraft N4926B no later than 30 days from the expiration of the original court order (expiration date 07/19/81) that authorized the installation of the electronic equipment. You are also directed to make any neces-

> sary repairs to said equipment in the 30-day period, as appropriate for proper maintenance.

Record on Appeal, Government Exhibit 7. Thus, under the extension order, the government was directed to remove the beeper no later than August 19, 1981.[1]

Despite the explicit directive in the extension order that the beeper be removed, the government failed to do so. Although the removal date came and went, the government sought no further extension period from Magistrate Boyd and made no attempt to comply with the order requiring the beeper's removal. Accordingly, the still-operative tracking device remained inside the aircraft past August 19, 1981.

On August 22, 1981, the Houston Control Center began tracking an aircraft emitting the special frequency signal associated with U.S. Customs beepers. U.S. Customs officer Bobby Richardson monitored the airplane's movements on a radar scope and directed the effort to intercept the target craft. Aided by Richardson's electronic surveillance, other Customs officials manning Customs aircraft sighted the target craft and followed it to its destination. The target craft, a twin-engine Beechcraft bearing the registration number N4926B, landed at Castroville, Texas, at approximately 2:20 a.m.; Customs officials immediately arrested its pilot, appellee Harold Dean Butts, and searched the airplane. The search produced a quantity of marijuana and various other items of evidence.

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1. The original court order encompassed the 30-day period following June 19, 1981. This period would have ended on July 19, 1981, a Sunday. Under Fed. R. Crim. P. 45(a), however, the original authorization arguably did not expire until Monday, July 20, 1981. Thus, the extension order expired on August 19, 1981.

B. Procedural History

Appellee Butts was charged with importing marijuana into the United States from Mexico, in violation of 21 U.S.C. §§ 960(a)(1), 952(a) (1976), possession of marijuana with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) (1976), and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. § 924(c)(2) (1976). Appellee moved to suppress all evidence obtained as a result of the monitoring of the beeper installed inside the aircraft he was piloting on August 22 and 23, 1981. Following a lengthy hearing on the matter, the United States District Court for the Western District of Texas granted the motion to suppress.

Noting that the Fifth Circuit had never considered the legality of a warrantless installation of a beeper inside a vehicle, the district court held that "in the absence of an applicable exception to the warrant requirement, installation of a beeper requiring physical entry into an aircraft demands a search warrant." Record on Appeal, Vol. II at 14. The court noted that in this case the government had obtained a search warrant to install the beeper, but also observed that the government had failed to obey the magistrate's directive to remove the beeper by a particular date. *Id.* Thus, the district court framed the issue as follows:

> The tracking of Aircraft N4926B on August 22 and 23, 1981, and the seizing of all evidentiary items from the aircraft on August 23, 1981, were made possible solely because the beeper remained on board past the expiration date of August 19, 1981. Should the failure to have removed the beeper by August

> 19 require the suppression of all evidence obtained from monitoring the beeper after that date?

Id.[2]

By analogy to the wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (1976), the district court determined that in this case surveillance of the aircraft after the termination date set forth in the court order was unlawful.

> Not only had the order authorizing installation of the beeper expired, but Customs failed to obey an affirmative directive to remove the beeper no later than August 19, 1981.
>
> . . . [W]hen such beepers are installed inside an airplane under court order, there must be some guideline to dictate by what time they must be removed.

Record on Appeal, Vol. II at 15. Accordingly, the court suppressed all evidence obtained as a result of the beeper's continued presence in the airplane past the termina-

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2. Before turning to the merits of this question, the district court addressed the issue of Butts' standing to contest the installation and monitoring of the beeper. First, the court held that Butts' status as the pilot of the target craft during its August 22 and 23 flight adequately established his standing to complain of the monitoring of the beeper. Record on Appeal, Vol. II at 14. Second, in evaluating Butts' standing with respect to the installation of the beeper, the court referred to the government affidavit executed to obtain the original warrant. The affidavit described the pilot of the subject aircraft with some particularity; the description matched that of appellee Butts. Accordingly, the court found that Butts had possession and control of the aircraft at the time of installation sufficient to confer standing to challenge that installation. *Id.* at 10 n. 1, 14-15. Neither party disputes these conclusions on appeal.

tion date of the warrant. The government appeals from the district court's order, pursuant to 18 U.S.C. § 3731 (1976).

II. ISSUES ON APPEAL

The government argues that the district court's suppression of evidence was in error. Viewing this as essentially a beeper monitoring case, the government relies heavily upon the recent United States Supreme Court decision in *United States v. Knotts*, ___U.S.___, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). Basically, the government claims that its failure to remove the beeper as required by the court order does not invalidate the stop and search of the airplane, because warrantless monitoring of beeper signals is permissible under *Knotts*.

Our approach to this case is somewhat different from that urged by the government. We begin with a bit of background about beepers, including a short history of Fifth Circuit "beeper jurisprudence" and a review of the development of a bifurcated analysis in beeper cases. We continue by applying that bifurcated analysis, examining the installation of the beeper and its subsequent monitoring as discrete issues. With respect to warrantless beeper monitoring, we consider the applicability of *Knotts* to the case at bar. With respect to beeper installation—the aspect of this case that commands most of our attention—we evaluate the attachment and maintenance of a beeper in the interior of a vehicle in terms of the fourth amendment and the protections it affords. We now turn to our discussion of these issues.

III. JEEPERS CREEPERS, WHERE'D YOU GET THOSE BEEPERS?: ELECTRONIC TRACKING DEVICES AND THE FOURTH AMENDMENT

A. A Bit of Background About Beepers[3]

An electronic tracking device—also called a "beeper," "beacon," or "transponder"—is a miniature, battery-powered radio transmitter that emits a recurrent signal at a set frequency. When monitored by directional finders, the beeper provides information as to the location and movement of the object to which it is attached. A beeper is incapable of transmitting conversation or recording sounds. *See United States v. Bailey,* 628 F.2d 938, 939 n. 1 (6th Cir. 1980).[4] For this reason, beepers do not fall within the definition of wiretapping devices. *See* Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510(5) (1976). Predictably, the use of beepers by law enforcement officials to locate and track individuals suspected of criminal activity has generated a significant amount of litigation.

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3. *See generally* Carr, *Electronic Beepers,* 4 Search & Seizure L. Rep. No. 4 (1977); Dowling, *"Bumper Beepers" and the Fourth Amendment,* 13 Crim. L. Bull. 266 (1977); Marks & Batey, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions,* 67 Ky. L. J. 987 (1978); Note, *Electronic Tracking Devices & Privacy: See No Evil, Hear No Evil, But Beware of Trojan Horses,* 9 Loy. U. Chi. L. J. 227 (1977); Note, *Finders Keepers, Beepers Weepers:* United States v. Knotts—*A Realistic Approach to Beeper Use and the Fourth Amendment,* 27 St. Louis U. L. J. 483 (1983); Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment,* 86 Yale L. J. 1461 (1977); Annot., 57 A.L.R. Fed. 646 (1980).

4. For a description of the technical aspects of a beeper's operation, see Dowling, *supra* note 3.

1. *Beepers in the Courts*

a. Fifth Circuit[5]

The Fifth Circuit first addressed the fourth amendment problems associated with beeper use in *United States v. Holmes,* 521 F.2d 859 (5th Cir. 1975). In *Holmes,* government agents attached an electronic tracking device under the right rear wheel of Holmes' van, without first obtaining a warrant. Subsequent monitoring of the beeper led to the seizure of 1200 pounds of marijuana and the arrest of nine persons. The *Holmes* panel held that the installation of the electronic tracking device was a search under the fourth amendment and affirmed the district court's suppression of the evidence obtained as a result of monitoring the beeper. *Id.* at 864, 867. The government's application for rehearing en banc was granted, however, thus vacating the panel opinion. *United States v. Holmes,* 525 F.2d 1364 (5th Cir. 1976); *see* 5th Cir. R. 17. On rehearing en banc, the court divided equally on the electronic tracking issue. *United States v. Holmes,* 537 F.2d 227, 227-28 (5th Cir. 1976) (en banc). Thus, although the district court's suppression of the evidence was affirmed, the fourth amendment questions presented by government use of tracking devices remained unanswered.

In decisions subsequent to *Holmes,* the Fifth Circuit generally avoided the potential fourth amendment issues

5. Due to the nature of the case at bar, we confine our review of the Fifth Circuit literature to cases involving beepers attached to vehicles. Beepers also are commonly installed in containers and contraband. *See, e.g., United States v. Sheikh,* 654 F.2d 1057 (5th Cir. 1981); *United States v. Lewis,* 621 F.2d 1382 (5th Cir. 1980); *United States v. Pringle,* 576 F.2d 1114 (5th Cir. 1978); *United States v. Bishop,* 530 F.2d 1156 (5th Cir. 1976); *United States v. Perez,* 526 F.2d 859 (5th Cir. 1976).

presented by the use of beepers. For example, in *United States v. Abel,* 548 F.2d 591 (5th Cir.), *cert. denied,* 431 U.S. 956, 97 S.Ct. 2678, 53 L.Ed.2d 273 (1977), the owner of an aircraft expressly consented to the government's installation of a tracking device on his plane. The government stipulated that the attachment of the beeper was a search, but the court held that the search was reasonable because the plane's owner had consented. *Id.* at 592. *See also United States v. Cheshire,* 569 F.2d 887, 888 (5th Cir. 1978) (if search occurred, owner's consent to placement of beeper came within the third-party consent exception to warrant requirement). In *United States v. Reyes,* 595 F.2d 275 (5th Cir. 1979), the court pretermitted consideration of the appellants' objections to the installation and use of a transponder in an aircraft for fourteen months, holding that the appellants lacked standing to object to the putative search. *Id.* at 278-79. Thus, prior to 1980, no binding Fifth Circuit authority squarely addressed the fourth amendment considerations of beeper use.

Then came *United States v. Michael,* 645 F.2d 252 (5th Cir.) (en banc), *cert. denied,* 454 U.S. 950, 102 S.Ct. 489, 70 L.Ed.2d 257 (1981). *Michael* involved the warrantless installation and monitoring of an electronic tracking device attached to the exterior of a van. Using the beeper, government agents located a warehouse where various evidence of criminal activity was found. The district court suppressed the evidence as fruit of the warrantless installation of the beeper, holding that the government's failure to obtain a search warrant prior to installation violated the fourth amendment. A panel of the Fifth Circuit affirmed the district court's suppression of the evidence. *United States v. Michael,* 622 F.2d 744

(5th Cir. 1980). On rehearing, however, the court en banc reversed the district court. *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981) (en banc).

The en banc court in *Michael* held that reasonable suspicion alone was adequate to support the warrantless installation and monitoring of a beeper attached to the exterior of an automobile. The court began by assuming that the installation of the beeper was a search.[6] *Id.* at 256. The court then applied a "dual privacy and intrusiveness analysis" to the facts of the case. *Id.* The court first recognized that an individual's expectation of privacy in an automobile is less than in other property, emphasizing that "Michael's expectation of privacy with respect to the *movements* of his automobile was substantially reduced." *Id.* at 258 (emphasis added; footnote omitted). Second, the court observed that the intrusion occasioned by the placement of the beeper was minimal. Specifically noting that the interior of the van had not been searched, the court commented that "[t]he actual installation of the beeper was much less intrusive than the typical stop and frisk." *Id.* Accordingly, the court held that the government agents' reasonable suspicion that Michael was engaged in criminal activity justified the installation of the beeper. *Id.* Turning to the monitoring aspect of the case, the court concluded that monitoring the beeper did not violate Michael's reasonable expectation of privacy because the van was exposed to public view as it traveled over public roads. Therefore, the court held that govern-

6. The court noted the view of seven specially concurring judges that the installation of the beeper on the van was not a search or seizure and therefore did not implicate any fourth amendment interests. 645 F.2d at 256. *See id.* at 259-60 (Clark, J., concurring). The court's ultimate determination that the installation of the beeper was permissible made resolution of the "search" question unnecessary.

ment agents did not violate Michael's fourth amendment rights by monitoring the beeper, because they had reasonable suspicion to believe that he was conspiring to manufacture a controlled substance. *Id.* Stating that the governmental interest in eliminating illegal drug traffic was a persuasive reason for permitting such a minimally intrusive practice, the court concluded that neither the installation nor the monitoring of the beeper attached to the exterior of Michael's van violated the fourth amendment. *Id.* at 259.

Michael clearly held that government agents need not obtain a warrant prior to installing an electronic tracking device to the *exterior* of a vehicle. As later cases have recognized, however, the propriety of warrantless beeper installation in the *interior* of a vehicle is a question that remains open. In *United States v. Cady,* 651 F.2d 290 (5th Cir. 1981), *cert. denied,* 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed.2d 459 (1982), the court assumed without deciding that a beeper installation requiring physical entry of an aircraft was an act sufficiently intrusive to be deemed a search. The court in *United States v. Flynn,* 664 F.2d 1296 (5th Cir.), *cert. denied,* 456 U.S. 930, 102 S.Ct. 1979, 72 L.Ed.2d 446 (1982), did not address the legality of warrantless beeper installation inside a conveyance because it held that the government's intrusion into the aircraft there was justified by a valid warrant. The *Flynn* court read *Michael* as "suggest[ing], at least inferentially, that its holding is limited to cases in which attachment of the beeper involves no physical intrusion into the conveyance." *Id.* at 1300 n.9. Likewise, in *United States v. Parks,* 684 F.2d 1078 (5th Cir. 1982), government agents entered a plane's interior through a closed door and affixed a beeper to the plane's interior. Specifically noting

that the *Michael* decision was not dispositive of the legality of the installation, maintenance, and monitoring of the beeper in *Parks*, the court held that the appellants lacked standing to challenge the beeper-related issues. *Id.* at 1083 & n.6. Most recently, in *United States v. Kupper*, 693 F.2d 1129 (5th Cir. 1982), this court held that the installation of a beeper inside an airplane pursuant to a limited court order was permissible because the authorization order was supported by probable cause. The court commented that "[t]his case does not present a still undecided issue in our Circuit: whether the installation of an electronic beeper to the interior of an aircraft is a 'search' within the meaning of the Fourth Amendment." *Id.* at 1130 n.1.

As these references to the scope of *Michael's* holding illustrate, *Michael* does not govern all situations involving use of electronic tracking devices. In particular, post-*Michael* cases indicate a distinct hesitancy to extend that holding to beeper installations inside conveyances. Until now, however, no Fifth Circuit case has squarely presented the situation these cases have foreshadowed.

b. The Supreme Court

The Supreme Court recently addressed the issue of beeper monitoring in *United States v. Knotts*, ___U.S. ___, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). In *Knotts*, law enforcement officers believed that certain individuals were purchasing chloroform for use in the manufacture of illegal drugs. The officers obtained the seller's consent to place a beeper inside a drum of chloroform that was sold to the suspects. Using the beeper signals and visual surveillance, the officers ultimately traced the chloroform to a secluded cabin. The officers then secured a search

warrant and searched the cabin, where they discovered a drug laboratory. After the district court denied a motion to suppress evidence based on the warrantless monitoring of the beeper, Knotts was convicted for conspiring to manufacture controlled substances. The Eighth Circuit Court of Appeals reversed the conviction, holding that the warrantless monitoring of the beeper was prohibited by the fourth amendment because its use violated Knotts' reasonable expectation of privacy. *United States v. Knotts*, 662 F.2d 515 (8th Cir. 1981).

The United States Supreme Court reversed the court of appeals, holding that the monitoring of beeper signals was neither a "search" nor a "seizure" within the contemplation of the fourth amendment. 103 S.Ct. at 1987. The Court was careful to note that the installation of the beeper was not an issue in the case. "Respondent does not challenge the warrantless installation of the beeper in the chloroform container, suggesting in oral argument that he did not believe that he had standing to make such a challenge. . . . [W]e have not before and do not now pass on the issue." *Id.* at 1084 n.**.[7] Turning to the potential fourth amendment concerns raised by beeper monitoring, the Court equated such surveillance with "the following of an automobile on public streets and highways." *Id.* at 1085. The Court then held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 1085. The Court viewed the monitoring of the beeper as no more than a sense-enhancement de-

7. Three concurring justices emphasized that Knotts had not challenged the installation of the beeper in the drum. *See* 103 S.Ct. at 1087 (Brennan, J., concurring); *id.* at 1088 (Stevens, J., concurring).

vice, akin to a searchlight. *Id.* at 1086 (quoting *United States v. Lee,* 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202 (1927)). Accordingly, the Court held that the monitoring of beeper signals was not a "search" or "seizure" under the fourth amendment. *Id.* 103 S.Ct. at 1087.[8]

2. *A Bifurcated Analysis*

Knotts clarified the present state of "beeper jurisprudence" in two respects. First, the *Knotts* Court employed a bifurcated analytical framework for examining the fourth amendment implications of beeper use, separating the installation or attachment of the tracking device from the monitoring of its signals. Second, *Knotts* focused on the monitoring aspect of beeper use and concluded that monitoring—as distinguished from installation—impinged upon no fourth amendment values.

The bifurcated framework adopted in *Knotts* has been endorsed by courts and commentators alike. *See United States v. Bailey,* 628 F.2d 938 (6th Cir. 1980); *United States v. Bruneau,* 594 F.2d 1190 (8th Cir. 1979); *United States v. Miroyan,* 577 F.2d 489 (9th Cir.), *cert. denied,* 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978); Marks & Batey, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions,* 67 Ky. L.J. 987 (1978); Note, *Finders Keepers, Beepers Weepers:* United States v. Knotts—*A Realistic Approach to Beeper*

8. The Court emphasized that nothing in the record indicated that the beeper signal was received or relied upon after it indicated that the chloroform drum had reached the cabin. "[T]here is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin." 103 S.Ct. at 1087.

Use and the Fourth Amendment, 27 St. Louis U. L.J. 483 (1983); Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment,* 86 Yale L.J. 1461 (1977); Annot., 57 A.L.R. Fed. 646 (1980). Our prior Fifth Circuit cases also indicate an awareness of the distinction between the physical act of attaching a tracking device to an object and the use of the device, once attached, to monitor the object's location. *See Parks,* 684 F.2d at 1084; *Michael,* 645 F.2d at 256-58. In analyzing the case at bar, we too will treat installation and monitoring as two distinct questions. We now turn to our examination of these issues.

B. Beeper Monitoring

In applying this bifurcated framework to the facts of this case, we begin with the second branch of the analysis. As discussed above, *Knotts* stands for the proposition that the mere monitoring of an electronic tracking device is not a "search" or "seizure" under the fourth amendment, assuming that the installation of the device was permissible. *See also Parks,* 684 F.2d at 1086 (*"Absent an invasion of ownership or proprietary rights,* we hold that neither pilot nor passenger has a legitimate expectation of privacy in the movement of the plane through the public airways." (emphasis added)). We do not read *Knotts* to say, however, that monitoring of a beeper is permissible regardless of the circumstances surrounding its installation. Even if monitorial use of a tracking device does not constitute a search or seizure, the installation and maintenance of the device may potentially violate fourth amendment precepts. *See Bruneau,* 594 F.2d at 1194; *Miroyan,* 577 F.2d at 492. In our view, the question presented in the instant case is not the propriety of

turning on the listening mechanism to monitor the beeper; rather, the critical issue confronting us arises from the government's placing and leaving in place the sending mechanism in the interior of the aircraft. Thus *Knotts*, while informative, is not dispositive.

C. Beeper Installation

1. *Search or Seizure?*

Turning now to the first branch of our bifurcated analytical framework, we consider the fourth amendment implications of the installation and maintenance of an electronic monitoring device in the interior of an aircraft. In our view, the term "installation" in this context, encompasses the government's initial entry into the aircraft for purposes of attaching the beeper, the actual physical attachment of the device to the interior of the aircraft, and the continued presence of the beeper inside the aircraft for the period of its installation. The initial question presented is whether such installation of a tracking device is a "search" or "seizure" within the meaning of the fourth amendment.[9]

The starting point for our discussion is the fourth amendment itself, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

9. As noted earlier, the court in *Michael* assumed without deciding that the installation of a beeper on the exterior of an automobile was a "search." The court's analysis in that case was directed to the issue of the "reasonableness" of such a search.

> particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. In determining whether this particular form of governmental intrusion rises to the level of a fourth amendment "search" or "seizure," we turn to the benchmark case of *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *Katz* presented the question whether warrantless electronic monitoring of the contents of an individual's telephone conversations violated the fourth amendment. The government argued that no violation had occurred because there was no physical intrusion into the telephone booth from which Katz placed the calls. The Court disagreed, noting that "the Fourth Amendment protects people, not places." *Id.* at 351, 88 S.Ct. at 511. Finding that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth," *id.* at 353, 88 S.Ct. at 512, the Court held that the warrantless eavesdropping "constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*

The Court restated the oft-cited *Katz* test in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

> Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. *E.g., Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387, and n. 12 (1978); *id.*, at 150, 151, 99 S.Ct., at 434, 435 (concurring opinion); *id.*, at 164, 99

> S.Ct., at 441 (dissenting opinion); *United States v. Chadwick,* 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977); *United States v. Miller,* 425 U.S. 435, 442, 96 S.Ct. 1619, 1623, 48 L.Ed.2d 71 (1976); *United States v. Dionisio,* 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973); *Couch v. United States,* 409 U.S. 322, 335-336, 93 S.Ct. 611, 619-620, 34 L.Ed.2d 548 (1973); *United States v. White,* 401 U.S. 745, 752, 91 S.Ct. 1122, 1126, 28 L.Ed.2d 453 (1971) (plurality opinion); *Mancusi v. DeForte,* 392 U.S. 364, 368, 88 S.Ct. 2120, 2123, 20 L.Ed.2d 1154 (1968); *Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed. 2d 889 (1968). This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U.S., at 361, 88 S.Ct. at 516—whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." *Id.,* at 351, 88 S.Ct., at 511. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *id.,* at 361, 88 S.Ct., at 516—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.,* at 353, 88 S.Ct. at 512. See *Rakas v. Illinois,* 439 U.S., at 143-144 n. 12, 99 S.Ct., at 430; *id.,* at 151, 99 S.Ct., at 434 (concurring opinion); *United States v. White,* 401 U.S., at 752, 91 S.Ct., at 1126 (plurality opinion).

Id. at 740-41, 99 S.Ct. at 2580 (footnote omitted).

[1, 2] Applying the *Katz* analysis to this case, we hold that the installation of an electronic tracking device in the interior of a vehicle or conveyance is a "search" within the meaning of the fourth amendment. The gov-

ernmental intrusion presented here was a probing quest for evidence that entailed a physical invasion by law enforcement officials into the cockpit of an aircraft, physical attachment of a surveillance device to the interior of that aircraft, and the continued presence of the tracking device within the cockpit for over sixty days. In our view, an individual clearly has a legitimate expectation that governmental agents will not encroach upon the interior of a vehicle in such a fashion. Although recent cases have alluded to the diminished expectation of privacy associated with automobiles, none has held that an intrusion into a vehicle's interior is not a "search." *See, e.g., United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality); *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925). We decline to do so now.[10]

2. *Fourth Amendment Protection*

Having concluded that the interior installation of a tracking device constitutes a "search," we now consider

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10. *United States v. Johnson,* 431 F.2d 441 (5th Cir. 1970) (en banc), is not to the contrary. The *Johnson* court held that the fourth amendment was not violated by the opening of a car door by a police officer to verify the identification number of a vehicle that he had reasonable cause to believe was stolen. The court's opinion was expressed in the alternative: either the challenged intrusion was not a "search" within the meaning of the fourth amendment, or the inspection was reasonable under the fourth amendment. Unlike the intrusion associated with the interior installation of a beeper, the inspection that occurred in *Johnson* was limited in scope, purpose, and duration. Further, the police officer in *Johnson* performed the inspection with the consent of the car owner's wife. *United States v. Johnson,* 413 F.2d 1396, 1399 (5th Cir. 1969) (panel opinion). Thus, *Johnson* does not require a holding of "no search" in the instant case.

the fourth amendment requirements necessary to conduct such a search. The fourth amendment generally has been interpreted to include the requirement that searches normally be performed pursuant to a search warrant issued in compliance with the warrant clause. *Arkansas v. Sanders,* 442 U.S. 753, 758, 99 S.Ct. 2586, 2589, 61 L.Ed.2d 235 (1979).

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (footnotes omitted).

Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978). Thus, although a few "jealously and carefully drawn"[11] exceptions exist, in the ordinary case search of private property must be reasonable and must be made pursuant to a search warrant based on probable cause. *Sanders,* 442 U.S. at 758, 99 S.Ct. at 2590. The question presented here is whether the intrusion required to install a beeper in the interior of an aircraft necessitates the interposition of the warrant requirement.

We commence by considering the applicability of this court's en banc opinion in *Michael* to the question posed. As noted above, *Michael* created a limited exception to the warrant requirement for the installation of a beeper

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11. *Jones v. United States,* 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958).

on the exterior of an automobile. Assuming that the exterior attachment of the beeper was a search, the court held that reasonable suspicion alone was adequate to support such a beeper installation. *Michael,* 645 F.2d at 257. Because the government agents in *Michael* had a reasonable suspicion that Michael was engaged in criminal activity, the court held that the warrantless installation of the beeper in that case did not violate the fourth amendment. *Id.*

In evaluating the fourth amendment concerns associated with the exterior attachment of beepers, the *Michael* court employed a "dual privacy and intrusiveness analysis." *Id.* at 256. First, the court examined the scope of the individual's expectation of privacy in his automobile. *Id.* at 257-58.[12] Second, the Court evaluated the degree of intrusion occasioned by placement of the beeper. *Id.* at 258. Considering the individual's diminished expectation of privacy in an automobile parked in a public place, the minimal nature of the intrusion necessitated by exterior attachment, and the governmental interest in eliminating illegal drug traffic, the court determined that, in connection with exterior beeper installation, reasonable suspicion alone satisfied the fourth amendment. *Id.* at 256, 259.

Michael teaches that privacy and intrusion are the measuring rods to be used in evaluating the fourth amendment protections required for beeper installation. In *Michael,* a "substantially reduced" expectation of

12. In this section of the opinion, the court's treatment of the installation of the beeper seems to have merged with its analysis of beeper monitoring. For instance, the court noted that "Michael drove the van on public roads during the daytime." 645 F.2d at 257, and ultimately held that "Michael's legitimate expectation of privacy with respect to the *movements* of his automobile was substantially reduced." *Id.* at 258 (emphasis added).

privacy and the minimal nature of the intrusion permitted the exterior installation and maintenance of a beeper based on reasonable suspicion alone. Application of this privacy/intrusiveness analysis to the circumstances surrounding *interior* installation of tracking devices, however, compels a different result.

In regard to the privacy element of the *Michael* analysis, we acknowledge that an individual holds a diminished expectation of privacy with respect to automobiles and other conveyances. Diminished though it may be, however, an individual's expectation of privacy with regard to the interior of a vehicle is an interest worthy of protection. As the Supreme Court observed in *Cardwell*: "This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion." 417 U.S. at 591. The passenger compartment or cabin of a vehicle is an enclosed, self-contained area somewhat sheltered from public view and unexposed to public contact. Given these qualities, it seems self-evident that the interior of a vehicle outranks its rear bumper and its location on the privacy scale.[13] A yacht, an ocean liner, a mobile home, a camper, and Air Force One are all vehicles, yet surely their interiors are cloaked by privacy's veil. Thus, we believe the interior installation of a tracking device implicates privacy interests more significant than those considered in *Michael*.

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13. In *United States v. Hufford*, 539 F.2d 32 (9th Cir. 1976), government agents obtained a court order authorizing placement of a beeper on the battery of a pickup truck. The court cautioned that "[h]ad the agents not resorted to a warrant, entrance into the garage and the opening of the truck's hood would have been an invasion of an area in which Hufford had a reasonable expectation of privacy." *Id.* at 34.

Turning to the intrusion factor of the *Michael* analysis, we are likewise persuaded that the nature and scope of the intrusion occasioned by the installation of a tracking device in the interior of a vehicle is more egregious than that involved in *Michael.* In order to implant a tracking device inside a vehicle, government agents first must surreptitiously invade its passenger compartment or cabin, by opening a door, forcing a lock, or using a "common key." Following this initial physical intrusion, the device is affixed to the interior of the vehicle, where it remains long after the agents who planted it have withdrawn. In a very real sense, the beeper serves as a surrogate police presence that remains within the vehicle's interior and converts the area into a covert broadcasting station. Given the capacity of such devices to impart information, the introduction of these government-controlled objects into an area in which an individual legitimately retains an expectation of privacy constitutes an offensive invasion of fourth amendment values. The government, via its electronic counterpart, remains physically present within the interior of the vehicle from the moment its agents enter until the tracking device ceases to function. In this age of electronic wizardry, it is not too much to suppose that beepers soon will have virtually unlimited lifespans. The continuing intrusion of such a device into a privacy-cloaked area, an intrusion that could potentially last from here to eternity, mandates protections greater than those afforded by *Michael's* "reasonable suspicion" rule.[14]

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14. In *United States v. Parks,* 684 F.2d 1078 (5th Cir. 1982), a government agent obtained a warrant authorizing installation of a transponder inside an airplane for 30 days. When the warrant expired, the agent presented to the court an affidavit requesting an extension of the original order. The judge notarized the affidavit but failed to issue a written extension. The transponder remained inside the plane and ultimately was used to track the aircraft and to obtain

[3] We reiterate our belief that the invasion of protected privacy caused by beeper installation in vehicle interiors extends far beyond the initial entry required to affix the tracking device; indeed, the intrusion endures for the life of the beeper. *See Berger v. New York*, 388 U.S. 41, 59, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967) (prolonged period of electronic surveillance equivalent to "series of intrusions, searches, and seizures"). We are gravely disturbed by the prospect that such intrusions may continue *ad infinitum*, a concern echoed in the opinions of this and other circuits.[15] The surest way to guarantee that such an intrusion does not exceed reasonable bounds is to require judicial supervision of the

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evidence of criminal activity. Although the court decided the case on standing grounds, it noted that the physical presence of the transponder device was arguably unlawful after the original warrant expired. *Id.* at 1087. The court also stated that "[w]here a beeper is illegally present in the interior of a plane, we are reluctant to conclude that this continuing physical intrusion or trespass does not substantially infringe the property rights of the owner or other party having a significant proprietary interest in the plane." *Id.* at 1985. *Parks* foreshadowed our holding today: the illegal presence of a beeper in the interior of a plane does indeed infringe those rights in a fashion that violates the fourth amendment.

15. *See Kupper*, 693 F.2d at 1132 n. 2, 1134 (noting that magistrate's order authorizing beeper installation "was limited in duration"); *Parks*, 684 F.2d at 1085 (characterizing beeper's presence in aircraft interior as "continuing physical intrusion or trespass"); *United States v. Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982) (" '[T]he [c]ourt cannot countenance the potentially unlimited duration of this type of surveillance [location beepers].' " (quoting with approval *United States v. Cofer*, 444 F.Supp. 146, 149-50 (W.D. Tex. 1978)); *Bailey*, 628 F.2d at 945 & n. 12 (due to absence of termination date in authorizing warrant, beeper's presence could have continued "ad infinitum"); *United States v. Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977) (expressing need for reasonable time limitations and other reasonable restrictions on beeper's use); *United States v. Moore*, 562 F.2d 106, 113 n. 4 (noting that duration of beeper use was limited and cautioning that additional safeguards might be required for extensive periods of beeper installation).

initial installation and continued maintenance of a tracking device when it is secreted within a vehicle's interior. Accordingly, we hold that in the usual case a warrant based upon probable cause is required to install and maintain an electronic tracking device within the interior of a vehicle or other conveyance for an extended period of time. The fourth amendment demands nothing less.[16]

[4, 5] The fourth amendment requires warrants to describe the place to be searched and the persons or things to be seized. "It is too familiar to require citation that resistance to the issuance of general warrants, unrestrained as to persons, *times,* or places, supplied much of the incentive for its adoption." *Cady,* 651 F.2d at 291 (emphasis added). Requiring a warrant for only the actual entry into a vehicle necessary for interior attachment of a beeper would provide protection only against the government's initial intrusion into a protected area; such a requirement would do nothing to safeguard against the continual invasion of privacy associated with the beeper's presence. A warrant is necessary not only for the entry into the vehicle and the physical attachment of the beeper in its interior, but also for its continued presence for a period of time therein. To hold otherwise would permit the government to install a tracking device based on ephermeral probable cause and then to leave it in place long after the probable cause became "stale." Therefore, to ensure that no beeper is maintained within the interior of a vehicle for a period longer than that

16. We leave for another day resolution of the question whether and in what circumstances various exceptions to the warrant requirement would apply. *See* Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment,* 86 Yale L.J. 1461, 1496-1502 (1977) (suggesting that exceptions to warrant requirement should be available only in rare cases).

reasonably necessary, the court order authorizing attachment and maintenance must also impose a reasonable time limitation on the beeper's installation. *See Bailey*, 628 F.2d at 945-46; *Curtis*, 562 F.2d at 1156; *United States v. Cofer*, 444 F.Supp. 146, 149-50 (W.D. Tex. 1978).[17] *Cf. Berger*, 388 U.S. at 59-60, 87 S.Ct. at 1883-1884 (electronic surveillance without time limit violates fourth amendment); Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2518(5) (1976) (thirty-day limit on electronic wiretapping). Our review of the cases involving beeper installations reflects that such time limitations are familiar restrictions. *See e.g., Kupper*, 693 F.2d at 1131-32 n. 2 (thirty-day limit); *Parks*, 684 F.2d at 1080 (same); *United States v. Chavez*, 603 F.2d 143, 144 (10th Cir. 1979) (sixty days); *United States v. Pretzinger*, 542 F.2d 517, 519 (9th Cir. 1976) (thirty days); *Cofer*, 444 F.Supp. at 149-50 (same).[18]

We are well aware that our holding establishes a standard for interior beeper installation that is different from that required under *Michael* for exterior attachment. In drawing a distinction between the interior and the

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17. *See also* Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment*, 86 Yale L.J. 1461, 1505 (1977) ("In order to halt the beeper's invasion of privacy . . . an issuing judge should include in the warrant express provisions for regular review of the progress of the search and should limit the absolute duration of the search to the shortest period consistent with demonstrated police needs.").

18. In *Michael*, the beeper attached to the van's bumper remained in place only from its installation on August 10 until it was removed at the end of August. *Michael*, 622 F.2d at 746 (panel opinion). Thus, the court did not need to discuss the potential problems that could arise from prolonged beeper installation. The opinion suggests, however, that installation and maintenance of a beeper on a vehicle's bumper is permissible for so long as "reasonable suspicion" continues to exist.

exterior of a conveyance, we are guided in part by the Supreme Court's disposition of *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality). In *Cardwell,* government agents acting without a warrant took paint scrapings from and examined the tire treads of a suspect's car after it had been lawfully impounded by the police. Although the Court permitted the warrantless search based on probable cause, it was careful to distinguish the minimal intrusion at issue with an interior search. *Id.* at 591, 94 S.Ct. at 2469 ("This is not to say that no part of the interior of an automobile has Fourth Amendment protection. . . ."); *id.* ("[N]othing from the interior of the car . . . [was] searched or seized and introduced in evidence."); *id.* at 592 n. 8, 94 S.Ct. at 2470 n. 8 ("Again, we are not confronted with any issue as to the propriety of a search of a car's interior."). We believe that both the degree of privacy inherent in the invaded area and the nature, scope, and duration of the government's intrusion mandate the more stringent requirements for interior installation and maintenance of tracking devices that we impose.

D. The Butts Beeper

Having examined in the abstract the propriety of interior beeper installations, we turn at last to the facts of the case at bar. Initially, one of the agents involved in this case appeared before a U.S. magistrate and obtained a warrant authorizing the agent to install a beeper within the subject aircraft within ten days. The court order further permitteed the beeper to be maintained inside the aircraft for thirty days following its installation. During the time period encompassed by this initial warrant, an agent installed the tracking device inside the cabin of the

aircraft. Thirty-two days passed; presumably the warrant had expired. Again an agent appeared before the magistrate, requesting an extension of the original order, although he presented no new material facts to support the extension. The magistrate then issued an extension order for an additional thirty-day installation period. This second order allowed the agents to re-enter the aircraft at any time during the thirty-day extension period to make necessary repairs to the beeper and directed its removal no later than August 19, 1981. Nevertheless, the beeper remained on board the aircraft past the court-ordered removal date.[19] On August 22 and 23, 1981, after the period specified in the extension order had expired, the beeper was used to track the aircraft and Butts, its pilot; ultimately the beeper's use led to the discovery of various evidentiary items.

[6] The agent's actual entry into the cabin of the aircraft and the physical attachment of the beeper to the interior of the plane were undertaken pursuant to a valid warrant. The problem arises some sixty-four days later, when the beeper remained present in the aircraft after the expiration of the court order authorizing its installation and maintenance. For the reasons stated above, we hold that the continued presence of the beeper inside the plane beyond the time limit specified in the warrant violated the fourth amendment.[20] The court authorized the

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19. The careless practices of the law enforcement agents in this case are particularly disconcerting. The government has offered no explanation for the agents' failure to apply timely for an extension order, nor for their disobedience of the court order requiring the beeper's removal. In the words of the government attorney who appeared at oral argument, "They botched it." We cannot condone such deliberate disregard for an order of the court.

20. *United States v. Conroy*, 589 F.2d 1258 (5th Cir. 1979) does not compel a different result. *Conroy* involved a confidential DEA

intrusion for a particular fixed period of time; when the beeper remained in place beyond that period, its presence became constitutionally impermissible. The fruits of this constitutional violation were the signals emitted by the unlawfully placed beeper. Thus, by exploiting the illegality, the government agents were able to track the plane and locate the marijuana and other evidence. Accordingly, the district court properly suppressed the seized evidence. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).[21]

The government argues that the beeper's installation inside the plane beyond the court-ordered time limit is of no consequence and should not require suppression of the evidence to which it led. This is so, the government contends, because under *Michael* the same evidence could have been obtained in a constitutionally permissible man-

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informant who carried two beepers aboard a vessel being used to smuggle marijuana from Jamaica to the United States. Instead of keeping the beepers on his person, the informant attached them to the boat while he remained aboard. The court permitted this use of the beepers, construing the situation as one of the smugglers' misplaced confidence in the informant. *Id.* at 1264 (citing *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971)). In effect, the court considered *Conroy* to be a case of third-party consent to the beeper installations. Accordingly, it does not control here.

21. An alternative approach to the instant facts also supports this result. The initial entry into the aircraft and attachment of the beeper clearly required a warrant. Here the warrant—in effect a contract between the issuing court and the requesting agent—contained a condition subsequent requiring removal of the beeper on a certain date. That condition was not severable from the rest of the document; rather, it was an integral portion of the authorizing warrant. By violating the condition, the government violated the warrant as a whole. Accordingly, the government's entry into the aircraft and attachment of the beeper were warrantless and invalid under the fourth amendment. The results of the monitoring of the invalidly attached beeper must then be suppressed as the tainted fruits of the constitutional violation. The fourth amendment requires specific performance.

ner had the agents merely attached the beeper to the plane's exterior. We are not persuaded by this theory of "alternative availability." While the agents certainly might have proceeded in a lawful and proper manner, the problem here is that they did not do so. Had the government stationed one of its agents in the back of the plane's cabin to broadcast its location, or broken into Butts' home to obtain a copy of his flight plan, surely it would not deny a violation of the fourth amendment on the grounds that the plane's location *could* have been determined in some other, constitutionally permissible, fashion. "[W]hen the government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." *Knotts*, 103 S.Ct. at 1087 (Brennan, J., concurring) (emphasis in original).

IV. CONCLUSION

The high technology, electronic age in which we live highlights and exacerbates the historical tension between liberty and order. In this opinion we have attempted to bestow upon the right to privacy the dignity and privacy that it deserves, while cautioning governmental authorities that obedience to the law is essential lest respect for the law diminish to a point of nonexistence. To permit the government to invade the constitutional rights of its citizens is too high a price to pay for law enforcement. Certainly law enforcement officers must have powers and authorities, but we must be parsimonious and niggardly in opening up the private elements of our lives in the name of catching a marijuana salesman or two. We must be careful not to mutilate the fourth amendment bit by

bit and piece by piece, until it is relegated to a position of near obscurity. As the Supreme Court commented in *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

The fourth amendment has been the individual's shield for decades, one of the primary bulwarks of our liberty and freedom. Few other nations have given their citizens such privileges. Let us be the last to yield them.

For the reasons outlined above, we hold that the fourth amendment requires a warrant for the installation and maintenance of an electronic tracking device within the interior of a vehicle for an extended period of time. The warrant must include a reasonable time limit on the beeper's installation and may contain such other restrictions as the issuing court deems reasonable and necessary. In the instant case, the beeper remained inside the aircraft beyond the time limit established by the court order. Its presence became unlawful when the warrant expired, thereby tainting all the evidence obtained as a result of that violation. Accordingly, the district court's suppression of the evidence obtained as a result of the beeper's continued presence inside the plane was correct, and is hereby affirmed.

AFFIRMED.

CLARK, Chief Judge, dissenting:

A U.S. customs pilot, acting pursuant to a warrant, went inside a plane used by Harold Dean Butts. The agent searched it and planted a beeper tracking device. Butts did not know it was there the day it was installed, during any part of the next sixty-two days when it lawfully remained there, or during the following three days when it should have been removed under the warrant's terms.

The majority in this case excludes from use at trial the true facts derived from the monitoring of that beeper which revealed Butts' criminal conduct. The exclusion is ordered not because the tracking device was placed in the plane, but because another intrusion was not made into the plane's interior to remove the device. The majority decides this to protect Butts' reasonable expectation of privacy. I cannot comprehend the logic of this reasoning.

The only way Butts' reasonable expectation of privacy becomes legally cognizable is if the monitoring of the beeper signals after the sixty-second day became illegal. The meaning of and rationale for the Supreme Court's holding in *Knotts* are clear: The monitoring of a signal from a beeper on a vehicle operated on public streets is neither a search nor a seizure because the "monitoring" [of] the beeper signals complained of by respondent [did not] invade any legitimate expectation of privacy on his part." 103 S.Ct. at 1087. The monitoring of the beeper as Butts' plane crossed from Mexico into U.S. airspace is not a search or a seizure because the whereabouts of Butts' plane in the open, public airspace used by smugglers and all other aircraft users is not a matter he could ex-

pect to keep private. The expiration of the warrant is irrelevant to this expectation.

The majority opinion originates a requirement that any entry into a vehicle (plane, boat or car) to place a beeper requires a warrant based upon probable cause. It also creates a requirement that such a warrant have a time limitation. These two new strictures, originated for fourth amendment protection, should prove meaningless for others similarly situated if officers employing beeper techniques will recall our prior decisions. In *Michael,* we held that no warrant was required for attachment of a beeper to the exterior of a vehicle. In *Conroy,* we held that a government informant could surreptitiously plant beepers on a ship if he could gain access to the vessel by subterfuge. Therefore, in the future, officers may avoid the new warrant and time requirements either through the exterior attachment of beepers ala *Michael* or via surreptitious entry ala *Conroy.*

The majority also seeks to bolster its view with precisely the same twenty-four hour dragnet surveillance "bug-a-boo" which *Knotts* expressly rejected. *Id.* at 1086. It certainly does not fit the facts of this case. The signals that revealed Butts' illegal activity were monitored three days after the warrant-authorized surveillance period. The rule the majority establishes is that tracking during days covered by the warrant is not a search or seizure, but the tracking on the sixty-third day somehow becomes a search and seizure. I cannot comprehend how the transformation from "no search" to "search" occurs when all that has happened is that an officer has not reentered the airplane to remove the beeper.

There simply is no fourth amendment right in any way implicated in the failure to remove the beeper installed in this plane. Because there is not, it is altogether wrong to punish the public by denying it validly acquired information of criminal drug activity. The officers who violated the court's order to reenter the plane and remove the beeper are liable in contempt to the court whose order they infringed. Butts was not a victim of that infringement. Indeed, had they complied and again entered the airplane they may have come in view of other evidence of criminal activity. Butts surely had no interest in the reentry and removal of the beeper except to stop the transmittal of signals. Because *Knotts* teaches that the monitoring of the signals constituted neither a search nor a seizure, I respectfully dissent.

ON SUGGESTION FOR REHEARING EN BANC

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc without oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-81-CR-121

UNITED STATES OF AMERICA

v.

HAROLD DEAN BUTTS

(Filed April 13, 1982)

ORDER GRANTING MOTION TO SUPPRESS

The defendant has filed a motion to suppress all evidence obtained as a result of the tracking and subsequent search of the aircraft in which he was a pilot on August 22 and 23, 1981. For the following reasons, the motion to suppress will be granted.

FINDINGS OF FACT

On the afternoon of June 19, 1981, U.S. Customs pilot Lawrence Nichols executed an affidavit for a search warrant in San Antonio before U.S. Magistrate Jamie Boyd. The affidavit requested a warrant to install an electronic tracking device, or beeper, within a twin-engine Beechcraft B-50 aircraft, FAA Registration No. N4926B. The affidavit set forth allegations indicating that the aircraft might be used to import marihuana into the United States from the Republic of Mexico.[1]

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1. Paragraph 7 of that affidavit reads as follows:
   At 1500, 6/18/81, N4926B departed Castroville and flew to Seguin, Texas. The pilot of the aircraft was brought to the

Being satisfied that probable cause existed, on that same date, Judge Boyd issued a warrant authorizing the installation of a beeper in the aircraft within ten days. The warrant specifically stated: "Transponder or beeper to remain in aircraft for a period not to exceed thirty days." *Government Exhibit #6.*

Customs pilot Weatherman, accompanied by Nicholas, installed a beeper in the aircraft at 10:45 P.M. on the evening of June 19, 1981, while it was parked at the airport in Seguin, Texas. Weatherman entered the aircraft to secrete the beeper inside.

On July 21, 1981, Weatherman sought and obtained a thirty-day extension of the original authorization from Judge Boyd. In seeking the extension, Weatherman made no affidavit and relayed no additional material facts to Judge Boyd. The extension order read in relevant part as follows:

> YOU ARE HEREBY GRANTED an extension forthwith on the above described Beechcraft B-50 aircraft, bearing registration number N4926B, a transponder signaling device to remain on aircraft N4926B for a period of 30 days. You are also directed to remove the transponder from aircraft

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airport in a dark green Lincoln bearing Texas registration BSG-942. This same vehicle picked up the pilot at Seguin. The pilot, who is described as a WM, 50-55 years old, 175-180 pounds, brown/grey hair, with a dragon tattoo on his right forearm, purchased 40 gallons of fuel in Castroville, paying cash. At Seguin the pilot left the aircraft at an avionics shop requesting that the radios be checked out.

Government Exhibit #5. The description of the pilot matches that of the defendant, Harold Dean Butts. *See* Defendant's Exhibit E and F. Thus, the defendant exercised possession and control over the aircraft at the time that the warrant for installation was applied for.

> N4926B no later than 30 days from the expiration of the original court order (expiration date 07/19/81) that authorized the installation of the electronic equipment. You are also directed to make any necessary repairs to said equipment in the 30-day period, as appropriate for proper maintenance.

Government's Exhibit #7. Under Judge Boyd's order, then, Customs was directed to remove the beeper no later than August 19, 1981.[2]

In spite of Judge Boyd's affirmative directive for the beeper to be removed, the device remained in the aircraft past the expiration date. When the extension expired, Weatherman was out of state fulfilling a military commitment with the Reserves. Although two other officers in the San Antonio office were authorized to install beepers, the beeper remained in the aircraft past the expiration date, even though no further extension was sought from Judge Boyd.

In late August of 1981, there were a total of twenty Customs beepers installed in aircraft throughout the United States. Of these twenty, five were in the Texas area—two in Dallas, one in Tyler, one in Beaumont, and one in the Seguin aircraft involved in this case. The Seguin aircraft, then, was the only beeper-installed aircraft located within 200 miles of San Antonio.

The beepers emit a specific frequency that can only be picked up by ground radar. The signal is unique to Customs; when such a signal is received by ground radar,

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2. July 19, 1981, was a Sunday. Consequently, despite language in the extension order, an argument can be made that, under Rule 45(a), F.R.Cr. P., the original authorization did not expire until July 20, 1981. The 30-day extension, then, would have expired on August 19, 1981, rather than August 18, 1981.

it is known to be from an aircraft being monitored by Customs. However, other than geographic location, there is no way of telling which particular aircraft is emitting the signal.

At approximately 1:00 P.M. on the afternoon of August 22, 1981, Houston Control Center alerted Customs that an aircraft emitting the Customs-beeper frequency was being tracked south from the Guadalupe County area (where Seguin is located). The aircraft was N4926B.[3] This aircraft was tracked, intermittently, on a course over the border into Mexico. The signal was lost entirely at approximately 2:51 P.M. after the aircraft had already entered Mexico.

At approximately 11:20 P.M. on August 22, 1981, a Customs-beeper signal was again picked up from an aircraft traveling in a northerly direction in the vicinity of Monterrey, Mexico. At this time, Customs officer Bobby Richardson was at the Houston Control Center and monitored this craft's progress on the radar scope. Richardson observed the target aircraft cross the border at Falcon Reservoir at approximately 12:05 A.M. on August 23, 1981.

Richardson was directing Customs aircraft in their endeavor to intercept the target craft. Richardson followed the aircraft north into Texas to the Karnes County Airport area near Kenedy, Texas. The aircraft then made some circling maneuvers, and Richardson completely lost radar contact at approximately 1:15 A.M.

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3. I made this finding based on the geographic location from which the signal was being emitted and the small number of aircraft having Customs beepers.

For thirty-five minutes, all contact with the aircraft was lost. It was not on radar at all, and the two Customs planes in the area made no visual sighting of the aircraft.

At approximately 1:50 A.M. Richardson picked up the target aircraft again. He picked it up in the Windy Oaks Ranch area, just southwest of the Karnes County Airport. Richardson vectored the Customs planes to intercept the target craft, which was heading northwest to San Antonio.

With help from Richardson, Customs officers Leslie and Walker in a Customs plane visually sighted the target craft in the vicinity of Pleasanton. Leslie noted that the target craft was flying without lights but turned them on as it neared San Antonio. Just south of San Antonio, the target craft veered west toward Castroville, where it landed at approximately 2:20 A.M.

Leslie and Walker landed in Castroville after the target craft. As the target craft taxied off the runway, Leslie maneuvered the Customs plane so as to block the target craft from attempting to flee. Leslie and Walker signalled the pilot with a flashlight, and the pilot shut his engines down. The pilot, Harold Dean Butts, exited the target craft—N4926B. Leslie and Walker advised Butts that they were Customs officers and that he was under arrest.

Several minutes later, Customs officers Nichols and Viera landed in another Customs plane. Nichols read Butts his *Miranda* rights, while Walker and Leslie performed a search of the aircraft. The stop and search of the aircraft produced the marihuana, other physical evidence, and statements attributed to the defendant that are sought to be suppressed.

CONCLUSIONS OF LAW

In *United States v. Michael,* 645 F.2d 252 (5th Cir. 1981) (en banc), *cert. denied,* 50 U.S.L.W. 3299 (U.S., Oct. 19, 1981), the Fifth Circuit held that reasonable suspicion alone was adequate to support the warrantless installation of a beeper to the exterior of a vehicle. *See* also *Electronic Tracking Devices and the Fourth Amendment—United States v. Michael,* 16 Ga. L. Rev. 197. The *Michael* court did not consider the legality of a warrantless installation of a beeper inside a vehicle. In two cases decided since *Michael,* Fifth Circuit panels have assumed without deciding that a beeper installation requiring physical entry into an aircraft is a full-scale search requiring a search warrant. *United States v. Cady,* 651 F.2d 290 (5th Cir. 1981), *cert. denied,* 50 U.S.L.W. 3591 (U.S., Jan. 25, 1982); *United States v. Flynn,* 664 F.2d 1296 (5th Cir. 1982).[4] Faced squarely with the question, this court holds that, in the absence of an applicable exception to the warrant requirement, installation of a beeper requiring physical entry into an aircraft demands a search warrant.

Here, a search warrant was obtained to install the beeper. However, Customs officers failed to remove that beeper by August 19, 1981, in spite of a directive in the extension order that it be removed by that date.

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4. The Fifth Circuit has decided at least two other beeper cases since *Michael.* In *United States v. Whitley,* No. 81-3432 (5th Cir., March 19, 1982), it found that a defendant—who neither owned, occupied, nor had a possessory interest in an aircraft—lacked standing to contest whether probable cause existed for issuance of a warrant authorizing installation of a beeper inside. In *United States v. Sheikh,* 654 F.2d 1057 (5th Cir. 1981), the Fifth Circuit upheld the warrantless insertion of a beeper in a package found to contain heroin during a boarder search.

The tracking of Aircraft N4926B on August 22 and 23, 1981, and the seizing of all evidentiary items from the aircraft on August 23, 1981, were made possible solely because the beeper remained on board past the expiration date of August 19, 1981. Should the failure to have removed the beeper by August 19 require the suppression of all evidence obtained from monitoring the beeper after that date?

The court will first address the issue of standing. The evidence reveals that Butts was the pilot of Aircraft N4926B for at least part of its flight during the late evening and early morning of August 22 and 23, 1981. Such evidence adequately establishes his standing to complain of the monitoring of the beeper. *United States v. Arce,* 633 F.2d 689, 694 (5th Cir. 1980), *cert. denied sub nom. Coronado v. United States,* 451 U.S. 972 (1981).

With respect to the defendant's standing at the time that the beeper was installed, this court has recourse to Paragraph 7 of Officer Nichols' affidavit executed before Judge Boyd to obtain the initial search warrant. That paragraph indicates that the defendant had possession and control of Aircraft N4926B at the time that the beeper was installed on the aircraft. *See* footnote 1, *supra.* This is sufficient to establish the defendant's standing to complain about the installation of and failure to remove the beeper. *See,* e.g., *United States v. Whitley,* No. 81-3432 (5th Cir., March 19, 1982).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-20, regulates wiretapping. Title 18 U.S.C. § 2518(5) provides as follows:

> No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

If surveillance is improperly continued after the authorization for a wiretap has terminated, such surveillance is unlawful and subject to suppression. *United States v. Cafero,* 473 F.2d 489, 497 (3rd Cir. 1973), *cert. denied,* 417 U.S. 918 (1974).

Similarly, this court is of the opinion that surveillance of the aircraft in this case after August 19, 1981, was unlawful and makes evidence obtained thereby subject to suppression. Not only had the order authorizing installation of the beeper expired, but Customs failed to obey an affirmative directive to remove the beeper no later than August 19, 1981.

The court realizes that surveillance of a moving aircraft by a beeper is, in some respects, less intrusive than

the monitoring of a phone conversation. But the fact remains that, when such beepers are installed inside an airplane under court order, there must be some guideline to dictate by what time they must be removed.

This court is in accord with the views expressed by Judge Roberts of this district in *United States v. Cofer*, 444 F.Supp. 146 (W.D. Tex. 1978):

> The Government seems to contend that the beeper is so much less intrusive than telephonic wiretapping that there is no need for the warrant to specify a termination date for the surveillance. While the intrusiveness may be less than that of wiretapping, the Court cannot countenance the potentially unlimited duration of this type of surveillance. Citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry. Here, the parties stipulated that there were beepers in existence in the Western District of Texas that had stayed operative for as long as 6½ months. This is simply too long a period of surveillance to be justified by a single showing of probable cause. This Court is of the opinion that such a warrant should be issued for only a 30-day period, subject to the possibility of renewal at the end of that time if the circumstances warrant it. *Cf.* Omnibus Crime Control Act of 1968, Title III, 18 U.S.C. § 2518(5). The 30-day limit must be reflected on the face of the warrant.

Id., at 149-50.

All evidence acquired as a result of the tracking and seizure of the aircraft must be, and hereby is, suppressed. The court invites the government's appeal under 18 U.S.C. § 3731 to clear up this muddled area of the law.

SO ORDERED this 13th day of April, 1982.

/s/ D. W. SUTTLE
D. W. Suttle
Senior United States District Judge

C-11

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-81-CR-121

UNITED STATES OF AMERICA

v.

HAROLD DEAN BUTTS

(Filed April 13, 1982)

ORDER EXCLUDING DELAY

An additional period of eighteen days is allowable for exclusion as time during which the motion to suppress was under advisement under 18 U.S.C. § 3161(h)(1)(J). Thus, the court finds that the period from March 12 to March 30, 1982, is excludable under 18 U.S.C. § 3161 (h)(1)(J). In addition, the period from March 31, 1982, to April 13, 1982, is excludable under 18 U.S.C. § 3161 (h)(8)(A). The court finds that, due to the existence of novel questions of law involved in the motion to suppress, such additional time was necessary to adequately pass on the issues presented. The court finds that the ends of justice served by the delay outweighed the best interest of the public and the defendant in a speedy trial.

SO ORDERED this 13th day of April, 1982.

/s/ D. W. SUTTLE
D. W. Suttle
Senior United States District Judge

C-12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-81-CR-121

UNITED STATES OF AMERICA

v.

HAROLD DEAN BUTTS

(Filed April 12, 1982)

ORDER

Being unopposed, the defendant's limited motion to reopen evidence on issue of standing is granted. The Clerk is directed to mark the additional photograph submitted by the defendant as Defendant's Exhibit "E" and the copy of the defendant's driver's license as Defendant's Exhibit "F."

SO ORDERED this 12th day of April, 1982.

/s/ D. W. SUTTLE
D. W. Suttle
Senior United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-1260

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HAROLD DEAN BUTTS,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(May 22, 1984)

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX E

NO. 84-111

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HAROLD DEAN BUTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-111

HAROLD DEAN BUTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing evidence obtained from the monitoring of an electronic tracking device ("beeper") installed in an airplane.

On September 1, 1981, petitioner was charged in an indictment returned in the United States District Court for the Northern District in Texas with importing marijuana into the United States, in violation of 21 U.S.C.

960(a)(1) and 952(a); possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2). On April 13, 1982, the district court suppressed all evidence obtained as the result of the monitoring of a beeper installed in an aircraft which petitioner piloted on August 22 and 23, 1981. It ruled that although a search warrant was obtained to install the beeper, it was unlawful for customs officials to fail to obey a directive in the warrant to remove it no later than August 19, 1981 (Pet. App. C1-C10). A panel of the court of appeals affirmed (Pet. App. B1-B35; 710 F.2d 1139). The full court granted the government's petition for rehearing en banc and, by a 10-5 vote, reversed the order suppressing evidence (Pet. App. A1-A38; 729 F.2d 1514).

Petitioner contends (Pet. 8-19) that the failure of customs officials to comply with the directive of the warrant requiring the removal of the beeper by a particular date violated the Fourth Amendment. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction affirmed on appeal, he will then be able to present his present contention to this Court, together with any other claims

1. It is now almost three years since the return of the indictment and more than 28 months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioner.

he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

2. Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

September 18, 1984

Mr. Gerald H. Goldstein
Goldstein, Goldstein & Hilley
2900 Tower Life Bldg.,
San Antonio, TX 78205

Re: United States,
v. James Connors Karo, et al.
No. 83-850

Dear Mr. Goldstein:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

By: /s/ Alexander L. Stevas
Alexander L. Stevas, Clerk

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2233
NO. 85-2234
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD DEAN BUTTS,
Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(November 15, 1985)

Before GEE, RANDALL and DAVIS, Circuit Judges;

PER CURIAM:*

Appellant, Harold Dean Butts, appeals his drug and firearms convictions on grounds that evidence was improperly admitted at trial. At a pretrial suppression hearing, the district court suppressed evidence obtained as a result of monitoring a transponder or tracking device left

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* Local Rule 47.5 provides: "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

inside an airplane following the time the warrant authorized the law enforcement officers to leave the transponder in place. An en banc panel of this court reversed and held that the evidence was admissible because monitoring an airplane in the sky constitutes no violation of the fourth amendment. *United States v. Butts,* 729 F.2d 1514, 1515 (5th Cir.) (en banc), *cert. denied,* 105 S. Ct. 181 (1984). The appellant was later tried and convicted and this appeal followed. Appellant now argues that the evidence, that was the subject of the prior appeal, was inadmissible because the warrant was issued without probable cause. This argument is precluded by our en banc decision which is the law of this case. *See Paul v. United States,* 734 F.2d 1064 (5th Cir. 1984).

AFFIRMED.